REPORTS

OF

CASES

ARGUED AND RULED

AT

Nisi Prius,

IN THE

COURTS OF KING'S BENCH

AND

COMMON PLEAS,

FROM EASTER TERM, 33 GEORGE III. 1793,
TO HILARY TERM, 36 GEORGE III. 1796,

BY ISAAC ESPINASSE,
OF GRAY'S INN, ESQ. BARRISTER AT LAW.

——— —— Quando artibus unquam honestis
Nullus in urbe Locus, nulla Emolumenta laborum? JUV. SAT. 3d

VOL. I.

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CASES

ARGUED AND RULED

AT

NISI PRIUS,

IN THE

KING'S BENCH.

EASTER TERM, 33 GEO. III.



SITTINGS AFTER TERM AT WESTMINSTER.

1793.

COOPER *v.* MARSDEN.

Tuesday, May 14th.

Entries in the books of bankers, merchants, &c. can only be proved by the clerk by whom the entries have been made; nor is other evidence admissible, though such person is abroad.

ASSUMPSIT for money lent and advanced, with the usual counts.

To prove payment of a draft at a banker's, a clerk of the banking-house was called, who produced one of the books belonging to the house, in which payment of the draft in question was entered. He was asked if the entry was in his own hand-writing. He said not; that it was the hand-writing of a person who had been a clerk in the house at the time when the draft was mentioned to have been paid, whose hand-writing he swore it was: but that that clerk was then gone to the *East Indies*, and was not likely to return.

The counsel for the plaintiff objected to the receiving of this evidence, the entry in the book not being in the hand-writing of the witness himself.

For the defendant it was contended, that this case was analogous to that of a witness to any deed, bond, or instrument in writing; in which case, if the subscribing witness is abroad, and so not amenable to the process of the court, that it was

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Where a witness to any instrument is abroad, proof of his hand-writing is sufficient proof of the execution of such instrument.

the constant practice to allow the proof of his hand-writing as sufficient proof of the execution of the deed, bond, or instrument to which his name was so subscribed.

Lord KENYON said, That in the case put by the defendant's counsel, that it was the practice to admit the proof of the execution of deeds and bonds, by proving the hand-writing of the subscribing witness, where it appeared that he was abroad; but that that was the case of a mere instrumentary witness, and could not govern the present: That the rule of evidence was clear, that entries in the books of bankers, or persons keeping books respecting their trade or business, could only [3] be proved by the clerks who had made the entries, inasmuch as they might give some material evidence, independent of the mere entry in the books, from having some acquaintance with the dealings upon which the entries were founded; whereas a mere instrumentary witness was only called to subscribe his name in evidence only of the execution of the instrument to which he subscribed it. He was therefore of opinion, that the evidence offered in this case was inadmissible; and accordingly rejected it.*

Garrow and *Russell* for the Plaintiff.

Erskine for the Defendant.

* Vide *Digby* v. *Stedman*, post. 328.

Tuesday, May 14th.

STEDMAN *v.* GOOCH.

If a bill or note is drawn payable at the house of a third person, a refusal by such person is good evidence of the non-payment of such bill or note, though he is no party to it.

THIS was an action of *assumpsit* for goods sold and delivered: the defendant pleaded 1st, The general issue. 2dly, Coverture. Upon the first plea issue was joined; and to the second was a replication, "That at the time of the "cause of action accrued, the defendant lived separate and "apart from her husband, and had from him a separate main-"tenance." Upon which plea another issue taken.

The defence relied upon on the general issue by the defendant was, that the plaintiff in discharge of her bill, which was for millinery goods furnished to the defendant, had taken three promissory notes of one *Finlay*, payable at the house of a Mr. *Browne*, and had given the defendant a receipt to that effect.

[4] Lord KENYON was of opinion that it then became incumbent

bent on the plaintiff to prove, 1st, that she had used due diligence to get the money from *Finlay*; and 2dly, that he after notice had made default in the payment.

To shew that she had used due diligence to get the money from *Finlay*, the plaintiff proved that she had sent *Finlay*'s notes to *Browne*, where they were made payable, and that *he* had been applied to respecting the payment: that in answer to that application he had said that he knew *Finlay*, but that he had no effects of his in his hands; nor could he pay them unless he had.

Mingay for the defendant objected: That these declarations of *Browne* were not evidence of *Finlay*'s default; that they were not bills drawn upon him, which he was bound to pay, but that he was only mentioned, as his house was the place where the notes were to be paid.

Lord KENYON said, that it was the constant practice to make country bank-bills and notes payable at certain houses in *London*; and though the persons at whose houses they were payable were not parties to them, nor personally liable, yet that an answer at such houses as to the payment or non-payment of the bills or notes made payable there, was sufficient. He therefore held *Browne*'s declarations to be admissible evidence of the probable non-payment of the notes in question. [5]

A letter delivered at the house of a person who has paid away a bill or note, informing him of the non-payment, is sufficient notice.

To prove notice to this effect to *Finlay*, the plaintiff called a witness, who proved that she carried a letter from the plaintiff to *Finlay*, inclosing the notes, and informing him that they were returned as not being likely to be paid: that she went to the house where *Finlay* lodged, for the purpose of delivering the letter to him: that she enquired for him from the woman who kept the house, and was informed that he was not at home: that she then left the letter inclosing the notes with this woman, and that the next morning the letter and bills were thrown into the plaintiff's house by some persons unknown. His Lordship was of opinion that this was sufficiently presumptive proof that the letter had come to *Finlay*'s hands, and therefore allowed it to be read. It was to the effect stated by the witness.

If a person in payment of a debt gives a bill or note which has some time to run, the party

It was then objected by the counsel for the defendant, That it appeared that these notes had been returned before they were payable: and that the plaintiff having taken them in discharge of her debt, for goods sold, could not maintain an action on her original debt for the goods, until an actual default in the

 payment

1793. STEDMAN v. GOOCH.

payment of these notes given in discharge of it, as the notes might be paid when they became due; nor should the plaintiff be allowed to judge of the probable or improbable ability of the party to pay at a future day.

receiving it cannot sue on his original debt until the time which such bill or note has to run is expired. *Aliter* if such bill or note was of no value.

Lord KENYON over-ruled the objection. He said, that to this effect the law was clear, that if in payment of a debt the creditor is content to take a bill or note payable at a future day, that he cannot legally commence an action on his original debt, until such bill or note becomes payable, or default is made [*6] *in the payment; but that if such bill or note is of no value, as if for example, drawn on a person who has no effects of the drawer's in his hands, and who therefore refuses it, in such case he may consider it as waste paper, and resort to his original demand, and sue the debtor on it.

In proof of the issue arising on the second plea, "that the "defendant lived separate and apart from her husband, and "had from him a separate maintenance," *Erskine* for the plaintiff stated, that the evidence he had to that effect was, first, a sentence of the ecclesiastical court, by which the defendant and her husband were separated; and 2dly, as to the separate maintenance, that he would prove that she received from her husband a regular annuity of 200*l.* *per ann.* payable at a banking-house in *London*.

Q. How far the sentence of the spiritual court is sufficient evidence of a separation.

To prove the separation, he produced and proved the *sentence* of the Spiritual Court, by which a divorce *a mensa et toro* was pronounced between the parties.

Mingay objected to this, and observed that the production of the sentence alone was not sufficient evidence; that the libel and all the proceedings in that Court should likewise have been produced.

Lord KENYON seemed disposed to be of opinion, that the sentence alone was sufficient; but reserved the point.

[7]

A separate maintenance must be reserved to the wife by deed, in order to make her liable to her own debts.

In proof of the separate maintenance, the plaintiff called the clerk of Messrs. ———'s banking-house; he swore that that house, by the direction and on the account of Mr. *Gooch*, the husband of the defendant, paid her 200*l.* *per annum* quarterly. He was asked if this payment was made in consequence of Mr. *Gooch*'s verbal directions, or if the witness knew of any deed by which the payment of that sum was secured to her? He answered, that he knew of no such deed. Upon which *Mingay* objected: that this evidence was insufficient to support this part of the issue: that in this action the wife was to

be

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be charged as a *feme sole:* that a *feme covert* had been so charged, by reason of her separate maintenance being property subject to no controul from the husband, but exclusively her own: that in the present case what was paid to the defendant might be a mere gratuity revokable at pleasure, and not a property independent of the husband, by reason of which only she could be charged with her own debts: that in all cases of separate maintenance which had come before the Court, the husband had secured by the intervention of trustees a separate maintenance to his wife, by which means only she could take from him a separate and independent property. He therefore relied, that as no deed appeared in this case, that the defendant could not be deemed to have such a separate maintenance in law as should subject her to the payment of her own debts.

Lord KENYON was of opinion, that it was necessary that the separate maintenance should be secured by deed; but as the point had never been expressly decided, his Lordship reserved it.

Erskine and *Marryatt* for the Plaintiff.

Mingay for the Defendant.

In the next term the two points so reserved came on before the Court, when the other Judges seemed to concur in opinion with Lord KENYON; but no judgment has been given.* [8]

* But see the case of *Marshall* v. *Rutton* since determined in B. R. 8 T. R. 545.

MORGAN v. SLAUGHTER.

Wednesday May 15th

Covenant in a lease not to assign or underlet without leave of the landlord in writing, is a fair and usual covenant.

THIS was an action of *assumpsit*, brought to recover the penalty of 50*l.* for breach of an agreement.

The agreement stated in the declaration was, "That the "defendant had agreed to assign to the plaintiff all his interest "in a lease of a public-house, of which thirteen years were "unexpired, and his good-will in the trade and business car-"ried on in it, in consideration of 200*l.*; and it was further "agreed, that the lease should contain *none but fair and usual* "*covenants;* and each party bound himself to the perform-"ance, under a penalty of 50*l.*"

The

1793.

Morgan v. Slaughter.

[*9]

The facts of the case were, that the defendant was possessed of such a lease, and for the time mentioned; but not having the lease * by him at the time he entered into the agreement stated in the declaration, he had made it part of the agreement, that when the lease came to be assigned, it should be found to contain none but fair and usual covenants.

The breach assigned in the declaration was, "That the lease did contain a certain covenant," *viz.* "That the lessee should not alien, assign, or under-let the premises or any part of them, without leave of the lessor in writing for that purpose first had and obtained;" and then averred, that this was not a fair and usual covenant, and so that the defendant could not perform his agreement.

The counsel for the defendant insisted, that the covenant was a fair and usual one adopted in all cases, from the times of which there are any reports, and cited to that effect *Dumpor's* case, 4 *Co.* 119; where a question arose on this very covenant, "Whether the lessor, having once permitted an assignment, had not for ever dispensed with the covenant?"

For the plaintiff—*Mingay* relied on the case of *Henderson* v. *Hay*, 3 *Brown's Cas. Chanc.* where, on a bill filed for the specific performance of an agreement to make a lease containing the fair and usual covenants, *Thurlow*, Lord Chancellor, was of opinion, that the covenant in question was not of that description.

Lord Kenyon said, he could not entertain a doubt concerning this being a fair and usual covenant. That it was a fair covenant as providing properly for the interest of the party demising: and as to its being a usual one, that it sufficiently appeared to have been a usual one so long since as the case cited by the defendant's counsel; and that he had never seen a lease properly drawn without it. That the plaintiff had therefore

[10] no cause of action, as the covenant was a fair and usual one; and the defendant had always been ready to assign the lease, in pursuance of the agreement. His Lordship therefore directed a nonsuit.

Mingay and *Shepherd* for the Plaintiff.

Erskine and *'Espinasse* for the Defendant.

1793.

CLIPSAM *v.* O'BRIEN.

CLIPSAM *v.* O'BRIEN.

Saturday, May 18th.

In an action against the maker of a note, letters of the indorser are not admissible evidence to impeach the indorsee's title, though the indorsement was made after the note was payable.

ASSUMPSIT on a promissory note by the indorser against the maker.

Erskine for the defendant, when the cause was called on, stated his defence to be—That the note in question had been made by the defendant payable to one *Withy*; that *Withy had* indorsed it to one *Stamford*, and *Stamford* to the plaintiff; but that the last indorsement from *Stamford* to the plaintiff had been made after the note was payable. He said, That as this circumstance enabled him to go into any equitable circumstance of defence which he might have had against the original parties to the note, that he had evidence to invalidate the transaction under which the plaintiff became *possessed of the note, but that for that purpose it would be necessary for him to use *Stamford* the indorser's letters: and the only question was, Whether the letters of the indorser were admissible evidence to impeach the indorsee's title to a note, under the above circumstances in an action against the maker?

[*11]

Lord KENYON was clearly of opinion that he could not.

Garrow and *Baldwin* for the Plaintiff.

Erskine for the Defendant.

DOE ex dem. DAVIDSON, Executor *v.* BARNARD, Assignee of TIMMINGS, a Bankrupt.

Same day.

What shall be usury where the money lent is in the form of stock in the public funds.

THIS was an ejectment by the executor of the mortgagee against the assignees of the mortgagor, to recover possession of the mortgaged premises.

The plaintiff proved the execution of the mortgage-deed by *Timmings*, the bankrupt, and the payment of the consideration-money: and there rested his case.

The defendant relied, that the loan of the money was on an usurious transaction, and that so all the securities were void under stat. 12 *Ann.* c. 16; and that the plaintiff could not therefore claim under the mortgage-deed.

To prove this case they called *Timmings*, the bankrupt, he having released: he stated, that having occasion for a sum of money before his bankruptcy, that he applied to ——— the

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mortgagee

1793.

Doe ex. dem. Davidson, Executor v. Barnard, Assignee of Timmings, a Bankrupt.

mortgagee, now deceased: that the mortgagee said, that all his money was in the funds, and that to sell out stock at that time would be a considerable loss, stock then standing at 72; but that if *Timmings* would take it at 75, that he should have the sum he wanted. *Timmings* then stated, that he consented to take the money on those terms, and that he received 1500 *l.* in stock valued at 75: that he sold out the same day, and that it produced but 72¼, by which he lost between 50*l.* and 60*l.*

A broker was called, who proved that 72¼ was the current price on the day on which the stock was so sold out.

Lord Kenyon held the transaction to be clearly usurious, and nonsuited the plaintiff.

Bower and —— for the Plaintiff.

Bearcroft for the Defendant.

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Girardy *v.* Richardson.

Wednesday, May 23d.

Assumpsit for use and occupation will not lie where the premises are let for an illegal purpose, or what is *contra bonos mores.*

ASSUMPSIT for use and occupation of certain rooms belonging to the plaintiff.

For the defendant it was proved, that she was a woman of the town: that the rooms had been let to her by the wife of the plaintiff, who, it was proved, managed the business of his house in letting the lodgings: that at the time of letting them, she was informed of the defendant's mode of life, and consented that she should be at liberty to receive male visitors, for the purpose of prostitution.

Lord Kenyon ruled, that under these circumstances the action was not maintainable: That the contract upon which it was attempted to be sustained was *contra bonos mores* and therefore could not support an action. His lordship therefore directed a verdict for the defendant.

Erskine for the Plaintiff.

Garrow for the Defendant.

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Stranger *v.* Searle.

Same day.

How far the evidence of a clerk of the post-office,

THIS was an action against the defendant as acceptor of a bill of exchange.

The defence set up by the defendant, was, that the hand-writing

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writing subscribed to the bill, purporting to be his acceptance, was a forgery.

Two witnesses on the part of the plaintiff proved the hand-writing of the defendant, and swore that they believed it to be his.

whose business it is to detect the forgery of franks, is admissible.

To encounter this testimony, the defendant called a clerk of the post-office, whose business it was to detect the forgery of franks. He was previously asked by the plaintiff's counsel, if by the bare inspection of a hand-writing he could pretend to ascertain whether it was a real or an imitated one? He said, (that except in very few cases) he could only do it by comparison of hands, or by knowing the party's hand-writing. It was admitted that he did not know the defendant's hand-writing.

Evidence of hand-writing from comparison of hands, not admissible.

Erskine for the defendant then offered to produce other bills of exchange accepted by the defendant, and which were proved to be his hand-writing, for the purpose of comparing them. This was objected to by the plaintiff's counsel, as it did not appear which was the real hand-writing of the defendant, those bills, or those upon which the action was brought, both being proved by witnesses; and that it was besides, judging from a comparison of hands.

[15]

Lord KENYON ruled, that the witness should not be allowed to decide on such comparison of hands.

A witness shall not be admitted to prove a writing not to be a party's hand-writing, from only having seen such party write in his presence, while the action was depending.

It was then said by the defendant's counsel, that the witness had seen him write his name several times. Being asked to the circumstances, he said, that previous to the trial the defendant had so written his name, for the purpose of shewing to the witness his true manner of writing it, that the witness might be able to distinguish it from the pretended acceptance to the bill in question.

His Lordship told him, that he should not permit that to influence his judgment, as the defendant might write differently from his common mode of writing his name, through design.*

He was then asked, Whether by the bare inspection of the hand-writing subscribed to the bill, he having no knowledge of the defendant's hand-writing, except as he had stated, he could determine whether it was his hand-writing, or a forgery? He answered in the negative. Upon which his testimony was rejected.

Mingay and *Const* for the Plaintiff.

Erskine for the Defendant.

* Vid. *Good Title* ex dem. *Revett* v. *Braham*. 4 Term Rep. 497.

SITTINGS

1793.

WELDON v. TIMBREL.

SITTINGS AFTER TERM, AT GUILDHALL.

WEEDON v. TIMBREL.

Monday, May 27.

Where the husband and wife live in a state of separation, an action of crim. con. cannot be maintained.

THIS was an action for criminal conversation with the plaintiff's wife.

It was proved that the plaintiff, having some suspicion of his wife's misconduct, had taken a lodging for her, for which and for her board he paid; and that at the time when the adultery was committed, they lived in a state of separation.

Lord KENYON ruled at the trial, that as the ground of this action was the depriving the husband of the society and comfort from the company of his wife, *that if they lived in a state of separation when the offence was committed, that the action could not be maintained.* He therefore directed the plaintiff to be nonsuited.

Garrow, Shepherd, and *Reader* for the Plaintiff.

Erskine for the Defendant.

Vid. S. C. 5 Term R.

In the following Term a new trial was moved for in this case; and the court of *King's Bench* concurred in his Lordship's direction.

[17]

SIMPSON v. ROBERTSON.

Same day.

IN an action for goods sold and delivered—Part of the demand was for clothes furnished to the son of the defendant by the plaintiff, who was a taylor.

Lord KENYON said, he had ruled before, that if a tradesman colludes with a young man, and furnishes him with clothes to an extravagant degree, that though the father might have been liable, had they been to a reasonable extent, that the tradesman who gives credit to such an extravagant degree, shall not at law be allowed to recover.*

Mingay and *Alderson* for the Plaintiff.

Bearcroft for the Defendant.

* Vide *Ford* v. *Fothergill*, post, 211.

POWELL

1793.

POWELL v. JONES.

POWELL v. JONES.

Wednesday, May 29.

It is not a sufficient acceptance of a bill of exchange to say, "There is your bill; it is all right."

THIS was an action against the defendant as the acceptor of a bill of Exchange, drawn from *Dominica*.

The defendant pleaded the general issue, and relied that he had never accepted the bill in question.

The acceptance, as proved by the witness on the part of the plaintiff, was in this manner: The bill was left with the defendant for acceptance by the plaintiff's clerk; the next day he called for the bill;* when the defendant returned it, saying, "There is your bill; it is all right." This the counsel for the plaintiff contended was a sufficient parol acceptance to bind him. [*18]

Lord KENYON ruled, that these words could by no implication amount to an acceptance; that they conveyed no evidence of the defendant's intention to bind himself to the payment of the bill at all events, which was necessary for the purpose of charging him as acceptor. He therefore directed the plaintiff to be called.

Erskine and *Marryatt* for the Plaintiff.

Mingay for the Defendant.

WETTENHALL v. WOOD.

Same day.

Money lent to play with, without any security, recoverable in *assumpsit*.

IN an action for money lent, the defence was, that the plaintiff kept a common gambling-house: that the defendant being there at play with several other persons, and having lost all his money, applied to the plaintiff for the loan of some money for the purpose of continuing the play; when the plaintiff lent him the sum for which the present action was brought.

Garrow for the defendant objected: that this being money lent knowingly to game with, was not recoverable. [19]

Lord KENYON was clearly of opinion that it was recoverable; for that the stat. of 9 *Ann* 14, only avoided *securities* for money lent to play with, and did not extend to cases of mere loans without any security taken. He therefore directed a verdict for the plaintiff.*

Erskine, and ——— for the Plaintiff.

Garrow for the Defendant.

* Vide *Barjeau* v. *Walmsly*, 2 Stra. 1249.

IN

IN THE COMMON PLEAS AT WESTMINSTER.

SAME TERM.

Birt v. Hood.

If a witness is called to prove that he himself is liable to the demand for which the action is brought, the plaintiff by suggesting that he is a partner, cannot deprive the party of his testimony.

ASSUMPSIT for goods sold and delivered. The defence set up on the part of the defendant was, that the business in the course of which the goods had been furnished, was carried on by his mother: that they were for her use, and on her credit, and not on account of the defendant, who merely worked in the business. The plaintiff admitted that the mother did carry on the business, but insisted that the defendant was a partner with her; and, that not having pleaded that matter in abatement, he might now be sued alone.

To prove the defendant's case, the mother was called.

Adair, Serjt. objected to the admission of her testimony, inasmuch as being a partner, and therefore liable to contribution in case the plaintiff recovered in this action, that it therefore became her interest to defeat it; and so rendered her incompetent: at all events, that some witness should be called to prove that no partnership in fact subsisted between the defendant and her.

Eyre, Chief Justice, over-ruled the objection. He said, that as the plaintiff had chosen to proceed against the defendant solely, that he should not then be allowed by suggesting merely the existence of a partnership between the defendant and the witness, to deprive the defendant of the benefit of her testimony, particularly where the effect of her testimony was to make herself liable.

Adair, Serj. for the Plaintiff.
Bond, Serj. for the Defendant.

Vid. post. Young v. *Brainer*. *Hilary* Term, 34 *Geo.* III. where the partnership being admitted, it was ruled by Lord Kenyon that a partner could not be a witness, though the effect of his testimony was to charge himself.

CASES

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AT

NISI PRIUS,

IN THE

KING'S BENCH.

TRINITY TERM, 33 GEO. III.

FIRST SITTINGS IN TERM, AT WESTMINSTER.

1793.

LOGAN v. HOULDITCH, *et alt.*

Wednesday, June 5.

A demand in writing left at the defendant's house, is sufficient in trover.

TROVER for a carriage and harness. To prove the demand a witness was called for the plaintiff, who produced a paper, a copy of which he had served on one of the defendants at his house. This was a demand in writing of the things for which the action was brought, signed by the plaintiff. There being some doubts as to the person upon whom the demand was served, whether he was one of the defendants or not,— [23]

Lord KENYON said, that a demand in writing, such as the present, *left at the house of the defendant*, was a sufficient demand to support that part of the evidence necessary in this action.*

Erskine and *Baldwin* for the Plaintiff.

Garrow for the Defendant.

* Vide *Thompson* v. *Shirley*, post, 31.

FIRST

FIRST SITTING AT GUILDHALL.

ARTAZA v. SMALLPIECE.

Thursday June 6.

[*24]

When goods are shipped to the order of the shipper, the custom of charging the person in whose name goods are entered at the Custom-house, with freight can only exist when the same person is consignee, or where the consignee is unknown.

THIS was an action of *assumpsit*, brought to recover the amount of the freight of 170 chests of oranges and lemons.

The goods had been shipped in a general ship from *Portugal*, and the bill of lading was *to the order of the shipper.** The goods had been entered at the Custom-house in the name of the defendant; and it was proved, that in general, where goods are so shipped to the order of the shippers, that the person in whose name the goods are entered at the Custom-house, was considered as liable to the freight: upon which principle the present action had been brought.

To prove this case, a witness was called on the part of the plaintiff, who proved the bill of lading and the entry at the Custom-house to have been made in the name of the defendant; but, in the course of his examination, it appeared that the defendant had bought them of one *Haynes*, to whom the bill of lading had been indorsed and sent by the shipper; which circumstance was known to the plaintiff.

Upon this evidence it was contended by *Mingay* for the defendant, that the action should have been brought against *Haynes*, not against the defendant: that *Haynes* was the consignee, and in that character liable to the freight; and that the custom of making him liable in whose name the goods were entered at the Custom-house, could only take place where such person was in fact the consignee, or where the consignee was not known.

Per Lord KENYON. The captain has a right to retain the goods shipped on board his vessel till he is paid his freight: if he parts with the possession of them, he must then resort to his contract. In the case of goods consigned, the consignee is the person liable to the freight, not the person to whom he sells them: that would be to enhance the price on him, as he must be supposed to buy them at a certain price independent of all charges, unless such charges are made part of the bargain. A right of action cannot be transferred from the person liable to another, by such person's own act. He, therefore, who is first

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liable

1793.

CLARKE v. SEARLE.

liable must remain so. Here *Haynes* was the consignee, and known to be such to the plaintiff, who cannot, by any supposed custom, transfer the liability to the defendant, who is only the purchaser of the goods from him. I am therefore of opinion the plaintiff must be called.

Erskine and ——— for the Plaintiff.

Mingay for the Defendant.

SECOND SITTING IN TERM, AT WESTMINSTER.

Monday, June 10.

CLARKE v. SEARLE.

Statute 25. *Geo.* 2. *c.* 26, extends to houses kept for the purpose of private dancing, not to public places only.

THIS was an action of debt brought to recover the penalty of 100*l.* given by statute 25 *Geo.* II. *c.* 36, *s.* 2. against any person who shall keep a house for public dancing, music, or other public entertainment, within the city of *Westminster;* such house not having been licensed in pursuance of the directions of the statute.

[26]

It was proved, on the part of the plaintiff, that the defendant was the proprietor of a house where persons of both sexes met to amuse themselves by dancing: that they paid for their admission, and that there were no performers who exhibited; but that the company danced for their own amusement.

Garrow for the defendant objected: that this case so made out for the Plaintiff was not within the statute, and that he therefore could not recover: that the statute was levelled against houses only where public dancers were kept for the purpose of exhibiting as performers; such as *Sadler's Wells,*— *The Circus,* and other such places of public resort; not to places where the parties meet for the purpose of amusing themselves, or of improvement in the accomplishment of dancing.

Lord KENYON over-ruled the objection. He said, the words of the statute were general: "any house kept for public dancing." There could be no doubt that this house was of that description, inasmuch as any person paying for his ticket would be admitted. Besides, that the act of parliament in question having been made to regulate all places of public

resort

1793.

CLARKE v. SEARLE.

resort, that an house of the description of the defendant's was equally an object of regulation by the magistrates as any other; as such places, if not properly regulated, became the resort of the vicious and profligate of both sexes.—The jury found a verdict for the penalty.*

Erskine and *Const.* for the Plaintiff.

Garrow for the Defendant.

* Vide *Bellis* v. *Burghall*, post, 2 vol. 722, where it was ruled, that a room kept by a dancing-master for the instruction of his scholars, and to which persons are *not indiscriminately admitted*, is *not* within the statute.

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[27]

SITTINGS AFTER TERM, AT WESTMINSTER.

KER *v.* MOUNTAIN.

Thursday, June 20.

A person paying the whole fare of a stage coach, may take his place at any stage of the journey; *aliter*, if he pays only a deposit.

IN this case, which was an action against the defendant as proprietor of a stage coach, it was ruled by Lord KENYON, That if a person takes a place in a stage coach, and pays at the time only a deposit, as half the fare for example, and is not at the inn ready to take his place when the coach is setting off, that the proprietor of the coach is at liberty to fill up his place with another passenger; but if at the time of taking his place he pays the whole of the fare, in such case the proprietor cannot dispose of his place; but he may take it at any stage of the journey he thinks fit.

Garrow, Park, and *Nolan,* for the Plaintiff.

Erskine and *Reader* for the Defendant.

[28]

DIBDIN *v.* SWAN and BOSTOCK.

Tuesday, June 25.

The editor of a public newspaper may fairly comment on any place of public entertainment; nor shall such a paragraph be deemed a libel.

THIS was an action against the defendants for a libel.

The plaintiff was the proprietor of a place of public entertainment, called *Sans Souci,* where he sung and performed certain songs which were supposed to be written and composed by himself.

The defendants were the editor and printer of a public newspaper called the *World.* The libel for which the action

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DIBDIN v. SWAN and BOSTOCK.

was brought, was a paragragh which appeared in that paper, insinuating that the songs were not in fact written by the plaintiff, but a person of the name of *Bickerstaff*, with whom the plaintiff had formerly been connected in bringing out several musical pieces, which had been performed with a considerable share of public applause. The paragraph further mentioned, that on the first night of the performance there had been a very thin audience, and that composed of persons admitted under orders: that the music of the songs was of very inferior composition, and that the applause bestowed on the performance was only from the persons who had so gained admittance; whereas the songs, both as to the words and music, were the composition of the plaintiff only, there was a very full audience, and the applause was genuine, and from persons no way connected with the plaintiff.

Lord KENYON stated the law on this subject to be—That the editor of a public newspaper may fairly and candidly comment on any place or species of public entertainment; but it must be done fairly and without malice or view to injure or prejudice the proprietor in the eyes of the public. That if so done, however severe the censure, the justice of it screens the editor from legal animadversion; but if it can be proved that the comment is unjust, is malevolent, or exceeding the bounds of fair opinion, that such is a libel, and therefore actionable. [29]

Mingay and *Lambe* for the Plaintiff.

Erskine for the Defendants.

DE BERKOM v. SMITH and LEWIS.

Wednesday, June 26.

A partnership may exist in a particular concern, which shall charge the parties to engagements only connected with such concern.

ASSUMPSIT to recover the value of a quantity of foreign lace against the defendants, charging them as partners.

It was admitted that *Smith*, one of the defendants, was liable; but the other defendant, *Lewis*, denied that he was a partner. This was the only question in the case.

The evidence on the part of the plaintiff was, That he was a foreigner, living at *Lisle* in *Flanders*; that having been applied to by the defendants for a quantity of lace on credit, that before he would furnish it, he wrote over to his correspondent in *London*, to enquire concerning their circumstances and situation; that his correspondent had enquired from a Mr. *Botham*, [30]

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De Berkom v. Smith and Lewis.

a merchant in *London;* who informed him that they were in partnership in trade; which information the correspondent communicated to the plaintiff, who in consequence thereof gave them the goods on the terms they asked.

Mr. *Botham's* clerk was called, and proved, That the only connexion in trade between Mr. *Botham* and the defendants was in discounting bills, which Mr. *Botham* had been in the habit of doing for *Smith,* one of the defendants; but that on discounting a bill at one time for *Smith,* that he had introduced *Lewis* to him as his partner.

Lord Kenyon upon this evidence ruled, that it was not sufficient to charge *Lewis* as his partner. His Lordship said, that persons might be partners in a particular concern or business, but that notwithstanding, if they did not appear to the world as partners, that it should not be sufficient to constitute a general partnership and make them liable in other cases not connected with such particular business. That the circumstance in evidence of the introduction of *Lewis* to Mr. *Botham* should be taken *secundum subjectam materiam,* that is, as applying to the transaction in which *Smith* was concerned with Mr. *Botham,* the discounting of bills, to which transaction only it should be confined; and that he was therefore of opinion, that without further evidence a general partnership could not
[31] be established, in order to charge *Lewis,* the other defendant, in this action.

It afterwards, however, appearing in evidence, that in fact *Lewis* had represented himself to the plaintiff as partner in trade with *Smith,* his Lordship in his charge to the jury added, That though in point of fact parties are not partners in trade, yet if one so represents himself, and by that means gets credit for goods for the other, that both shall be liable.

The Plaintiff recovered.*

Erskine and *W. Best* for the Plaintiff.

Bower for the Defendants.

* Vide *Arden* v. *Sharpe,* post, 2 vol. 524.

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THOMPSON (Assignee of ABRAHAMS, a Bankrupt) v. SHIRLEY and BODY.

SITTINGS AT GUILDHALL, AFTER TERM.

THOMPSON (Assignee of ABRAHAMS, a Bankrupt) v. SHIRLEY and BODY.

Friday, June 21.

A demand of payment for goods, for which an action of trover is brought, is a good demand to support the action.

TROVER by the plaintiff as assignee of one *Abrahams*, a bankrupt, for a quantity of paper, part of the bankrupt estate, of which the defendant had possessed himself.

Abrahams, the bankrupt, was a stationer, and had been in the habit of discounting the bills of one *Caslon* with the defendants; on which occasions he had usually put his own name on the back of them. Several of these bills being unpaid, and finding himself unable to discharge them, at a time when from the general state of his affairs he knew he must become a bankrupt, he was prevailed upon by the defendants to [32] give them an order to receive on his account, but for their own use, a quantity of paper which was then coming to the bankrupt; under which order, on the 3d of *January*, 1793, they obtained possession of the paper; and the present action was brought to recover it, on the ground of undue preference.

The demand was in writing, in the following words:—

"Gentlemen,

"I am directed by the assignees of *John Abrahams*, a "bankrupt, to write to you for payment of the sum of "78*l.* 5*s.* the amount of paper belonging to his estate, "which I understand you have disposed of; and unless "the same be immediately paid me, I have instructions "to take the necessary measures to enforce it.

5th *Feb.* 1793. "I am, &c.
To Messrs. Shirley and Body, "*William Bennett,*
Warwick-lane. "Plaintiff's Attorney."

Bower for the defendant objected: that this letter, which was [33] the only evidence of the demand, would not support the action, inasmuch as it was not a demand of the specific things for which the action was brought, which he contended was necessary in an action of trover, but of payment for them. That

a de-

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THOMPSON (Assignee of ABRAHAMS, a Bankrupt) v. SHIRLEY and BODY.

a demand of payment was affirming the contract, and therefore could not support an action of trover, which was founded on a wrong, and supposed a tortious conversion.

Lord KENYON over-ruled the objection, and held the demand to be good. He said that the demand in trover was only for the purpose of giving the defendants an opportunity of either restoring the goods in specie, or of making satisfaction to the party to whom they belonged; and that a demand of satisfaction had been held to be good in an action of trover. That the demand in the present case must be taken to be of that description, and not as affirming any pretended sale of them. And as the letter mentioned that the defendants had disposed of them, the plaintiff could not demand the specific goods, but a satisfaction only, upon the receiving of which no action would be brought.*

Erskine and ——— for the Plaintiff.

Bower for the Defendant.

Vid. Rockeby's case, *Clayt.* 122; where a demand of satisfaction in terms, was adjudged to be a sufficient demand in an action of trover.

* Vide *Logan* v. *Houlditch*, ante, 22.

[34]

Tuesday, July 2.

PHILLIPS, q. t. v. MENDEZ DA COSTA.

In debt on the Lottery Act, the plaintiffs shall recover no more penalties than he has sworn to in his affidavit to hold the defendant to bail.

DEBT *qui tam* on the Lottery Act, to recover several penalties for insuring numbers in the State Lottery against the statute.

The declaration consisted of twelve counts, for the insuring of so many numbers, particularly mentioned, in the Lottery; and went to recover distinct penalties for each number.

Garrow, for the defendant, produced the affidavit under which the defendant had been held to bail under the statute, which affidavit was sworn to one offence only, and insisted that the plaintiff should be limited to go for one penalty only, arising under the single offence so sworn to; and cited a case of *Israel (q. t.)* v. *Hart*, in which on a similar occasion Lord KENYON had so ruled it.

His Lordship continued of the same opinion, and ruled in the

the present case that the plaintiff should be confined to one penalty only. 1793.

Bearcroft and *Shepherd* for the Plaintiff.

Garrow for the Defendant.

PHILLIPS, q. t. v. MENDEZ DA COSTA.

[35]

Same day

RATCLIFF *v.* PEMBERTON.

In an action of covenant, under the general issue, the Defendant shall not be allowed to give in evidence what amounts to licence.

COVENANT on the charter-party of the ship ——, from —— to *Newry*, in *Ireland*. The action was brought to recover the demurrage settled by the charter-party, which was at 1*l. per diem;* and the declaration stated that the vessel was to be discharged by a certain day mentioned in the charter-party, whereas she had been detained twelve days beyond the time so limited for her clearance, whereby the plaintiff became entitled to 1*l. per diem* demurrage for that time. The defendant pleaded the general issue.

The case relied on, on the part of the defendant, was, that the plaintiff (who was master and owner of the ship) had waived all claim to demurrage, he having consented that the time should be enlarged within which the cargo was to be discharged, and offered evidence to prove that the defendant, who was the consignee, could have discharged the cargo by the time limited, but that the plaintiff gave him leave to take out the cargo at his leisure, as he (the plaintiff) was waiting for a freight.

The plaintiff's counsel objected to the receiving of this testimony, as the defendant had put the general issue only on the record; whereas the present defence set up was a collateral matter which went to discharge the breach, and amounted to a licence, which should have been specially pleaded.

Lord KENYON was of this opinion, and held the evidence to be inadmissible on the record as it then stood. His Lordship said, that every party should be fairly apprized by the pleadings what question he came to try. That in the present case, the licence and acquiescence of the plaintiff, that the time for discharging the cargo should be enlarged, was a good and legal defence against any claim for demurrage; but that the plaintiff should have known that the defendant meant to rely on that matter in his defence. That all that appeared on the face of the pleadings was a denial of the plaintiff's claim of demurrage; [36]

whereas

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RATCLIFF v. PEMBERTON.

whereas the defence confessed and avoided it; and therefore it should have been specially pleaded.

The counsel for the defendant desired his Lordship to make a note of the point; but a new trial was never moved for.

Erskine and *Baldwin* for the Plaintiff.

Law and *Marryatt* for the Defendant.

HIDE v. PROPRIETORS of the TRENT and MERSEY NAVIGATION.

Wednesday, July 3.

How far a common carrier may discharge himself from the duties imposed on him by law.

IN an action against the defendants as common carriers. *Per* Lord KENYON, there is a difference where a man is chargeable by law generally, and where on his own contract. Where a man is bound to any duty, and chargeable to a certain extent by the operation of law, in such case he cannot by any act of his own discharge himself. As in the case of common carriers, who [37] are liable by law in all cases of losses, except of those arising from the act of God, or of the king's enemies: they cannot discharge themselves from losses happening under these circumstances by any act of their own; as by giving notice, for example, to that effect. But the case is otherwise where a man is chargeable on his own contract: there he may qualify it as he thinks fit.

STONE v. BLACKBURN.

Same day.

An objection to the competency of a witness may be made at any stage of the cause.

CASE for negligently managing the defendant's vessel in the *Thames*, whereby the plaintiff's lighter was damaged.

After the witnesses on the part of the plaintiff had been examined in chief and cross examined, it was discovered that they were interested, and should have been released; which had not been done.

Mingay contended, that after having been examined and cross-examined, that the objection came too late.

[38] *Per* Lord KENYON. This is an objection to their competency; and objections to the competency of witnesses never come too late, but may be made at any stage of the cause.

Erskine for the Defendant.

HOME

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HOME CIRCUIT, SUMMER ASSIZE,

AT CHELMSFORD, CORAM, BULLER, JUSTICE.

RANDLE v. WEBB.

RANDLE v. WEBB.

If in an action of assault the day is material, and the defendant pleads *son assault*, the plaintiff must new assign.

IN an action of assault, the defendant pleaded *son assault demesne*; upon which plea issue was joined.

The assault laid in the declaration was on the 28th of *June*, on which day the assault for which this action was brought was really committed.

The counsel for the defendant began; and they proved an assault committed by the plaintiff on the defendant, on the 27th of *June*, and there rested their cause.

[39]

The counsel for the plaintiff would then have proved an assault by the defendant on the plaintiff, on the day laid in the declaration, (the 28th of *June*) which they contended was not answered by the defendant on his plea of *son assault*, by proving an assault on the 27th. But it was ruled by Mr. Justice *Buller*, that the day laid in the declaration being immaterial, the defendant's proving *son assault* on any day previous to the bringing of the action, was a complete answer to it; for that if the plaintiff had intended to have made the day material, that he should have new assigned it.* .

Bond, Serj. and *'Espinasse* for the Plaintiff.

Garrow and *Marryatt* for the defendant.

* Vide 2 Ld Raym. 1015

END OF TRINITY TERM, 33 GEO. III. 1793.

CASES

ARGUED AND RULED

AT

NISI PRIUS,

IN THE

KING'S BENCH;

MICHAELMAS TERM, 34 GEO. III.

FIRST SITTING IN TERM.

1793.

Nov. 11.

PRATT v. WILLEY.

What is usury in discounting a bill where part is given in goods.

THIS was an action by the indorsee of a promissory note, against the defendant, as the maker of it.

The pleas on the record were, 1st, The general issue; and 2dly, usury.

The usury attempted to be proved on the part of the defendant was, that the plaintiff had, in discounting the note in question, given in part a diamond ring, for which he had charged much beyond its value.

[41] It was said by *Erskine*, and assented to by Lord KENYON, that his Lordship and Mr. Justice BULLER had ruled on former occasions, That if in discount of a bill, the party discounting it gives goods in part; that if these goods are of a certain ascertained value, and given at that value, that that is not usury: but if the party so discounting the bill makes the holder of it take them at a higher value, that that shall be deemed usury; for that a party by substituting goods for money, shall not by colour

colour of their pretended value take above legal interest, and evade the statute.*

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PRATT v. WILLEY.

Erskine and ——— for the Plaintiff.

Mingay for the Defendant.

* Vide *Rich* v. *Topping*, post, 176.

SECOND SITTING IN TERM, AT GUILDHALL.

[42]

SLACK *v.* BRANDER and TEBBS (Sheriffs of London and COULSON.)

Tuesday, Nov. 19.

In trespass and false imprisonment against a Sheriff's officer for an illegal arrest, it is evidence against him that the warrant was directed to him.

IN trespass and false imprisonment. The action was brought for arresting the plaintiff in the city of *London*, on a bill of *Middlesex*, by *Coulson*, one of the defendants, who was a sheriff's officer. The plaintiff proved the arrest, and that the place where it was made was in the city of *London*.

For the defendant the warrant under which the arrest had been made was produced, and appeared to be directed to *Joseph Coulson* and *John Kellett;* and the execution indorsed was by *John Kellett* only: but the witness, who proved the arrest of the plaintiff, said, that the bailiff who made the arrest said his name was *Coulson*.

Gibbs for the defendant objected: That the indorsement on the warrant was to be taken as conclusive evidence that the arrest was made by *Kellett*, and not by *Coulson*, particularly as no evidence was offered that *Coulson* was present; and that as the plaintiff had made *Coulson* only a defendant, that the plaintiff should be nonsuited.

[43]

Lord KENYON over-ruled the objection, and held, that the warrant being directed to *Coulson*, and having been executed by a person who called himself by his name, that it was sufficient evidence to go to the jury, to decide whether *Coulson* was present at the time of the arrest or not.

Erskine and ——— for the Plaintiff.

Gibbs for the Defendant.

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SINTZENICK v. LUCAS.

SITTINGS AFTER TERM, AT WESTMINSTER.

Friday, Nov. 29th.

SINTZENICK v. LUCAS.

To an action on the case for unskilfully doing any work, it is no defence that the defendant in the action recovered in a former action for work and labour, which work and labour was that for the unskilfulness of which the action is thus brought.

THIS was an action on the case, for unskilfully varnishing certain prints, the property of the plaintiff, by which they were spoiled, and the plaintiff lost the sale of them.

[*44]

* After the case had been stated on the part of the plaintiff, *Garrow*, for the defendant, took a preliminary objection, which if sufficient went to the ground of the action: it was this, That an action had been brought by the present defendant against the present plaintiff in the Court of Common Pleas, for work and labour, which work and labour was the varnishing of these identical prints, the pretended spoiling of which was the object of the present action; and that in that action the present defendant had recovered. He said, that to that action the present plaintiff might well have set up in his defence that the prints had been spoiled; nor could the said defendant have recovered, if that fact had been proved. He therefore contended, that the verdict in that action was conclusive evidence that the varnishing of these prints had been done in a skilful and workmanlike manner, and was a complete answer to the present action. He therefore tendered in evidence the record of that action, as conclusive evidence in this.

Erskine for the plaintiff said, that the pleadings in that action were for work and labour generally, with a plea of the general issue.

A record evidence only of what is in issue, and appears on the record, ought to be conclusive of the matter; therefore evidence is not admissible to shew that any matter occurred at the trial not appearing on the face of the record.

Lord KENYON said, he was clearly of opinion the record offered in evidence could not conclude the present action, or prove any thing in the case. That, in order to make a record evidence to conclude any matter, it should appear that that matter was in issue, which should appear from the record itself; nor should evidence be admitted that under such a record any particular matter came in question. That the record of the cause in the Common Pleas was general, applying to every case of work and labour; and to inquire whether the object of it was to recover for the work done in varnishing the prints; and whether the defendant in that action had availed himself of the circumstance of their having been unskilfully done, would be to try that cause over again in this Court.

Court. His Lordship therefore rejected the evidence; and the plaintiff had a verdict. 1793.

SINTZENICK v LUCAS.

Erskine and *Gibbs* for the Plaintiff.

Garrow and *Lawes* for the Defendant.

[45]

TAYLOR v. BRANDER and TEBBS, Sheriffs of London.

Monday, Dec. 2d.

When a discharge comes from the plaintiff in an action for a defendant in custody on *mesne process* at his suit, the officer shall have a reasonable time afterwards to search the office; nor is the officer obliged to search till a discharge comes.

THIS was an action of trespass and false imprisonment. The case in evidence on the part of the plaintiff was, That having been arrested at the suit of one *Leese*, that *Leese* was willing to have discharged him immediately on the arrest being made; but not knowing the proper means to do it, it was not then done; but some time afterwards a discharge in writing came from *Leese*, * notwithstanding which the plaintiff was not then discharged, but detained for twenty-six hours after the receipt of such discharge; which was the false imprisonment complained of.

The reason assigned by the defendant for detaining him was, that it was necessary to search the office to see if any other writs were there against him, before they could discharge him with safety: That on searching the office, a writ was, in point of fact, found there against a person of the same name with the plaintiff; but who on inquiry being found to be a different person, the plaintiff was immediately set at liberty. [*46]

Per Lord KENYON. When a person is arrested, the officer is not bound to go immediately and search the office, to see if there are other writs against him; nor is the officer called upon to do it till a written discharge comes from the plaintiff at whose suit he is in custody; for not before is he entitled to his discharge, and therefore not till then is the officer called upon to make the search, which is for his own security. When therefore it becomes necessary for the officer to make such search, a reasonable time must be allowed him for the purpose, and twenty-four hours does not seem to be an unreasonable time for that purpose, particularly under the circumstances of this case, when a writ was found apparently against the same defendant.

His Lordship directed a nonsuit.

Erskine and *Bayley* for the plaintiff.

Mingay for the Defendant.

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Slipper (Assignee of Lane, a Bankrupt) v. Stidstone. Tuesday, Dec. 3d.

A debt due to two partners may be set off in an action brought against the survivor.

Slipper (Assignee of Lane, a Bankrupt) v. Stidstone.

THIS was an action of *assumpsit* for goods sold and delivered. Plea of the general issue, with notice of set-off. The set-off was a debt due by the bankrupt to the defendant, and one *Abbott*, who had been in partnership with him; but *Abbott* the partner was dead before the bringing of the present action.

Law for the plaintiff contended, that to an action brought against the defendant for a debt, and in his own right, that a debt owing to such person and another in a partnership account, could not be set-off, inasmuch as debts due in the same right could only be set off; and cited *Bull.* N. P. 179.

To this it was answered by the defendant's counsel, that the partner being dead, by law the right of action went to the survivor, who might maintain an action for it in his own name. That a set-off being given to avoid a circuity of action, that the set-off of the debt in question was to the same effect as if an action was brought in the defendant's name only, and therefore should be allowed in an action against him in his own person.

Lord Kenyon was clearly of this opinion, and allowed the set-off.

[48] *Law* and *Marryatt* for the Plaintiff.

Erskine for the Defendant.

In the following term, *Law* obtained a rule to shew cause why there should not be a new trial, on the supposed misdirection of the Judge; but he afterwards abandoned the rule, it being understood that the Court of *King's Bench* concurred in opinion with the Chief Justice; and he, on being asked, admitting the point not to be maintainable.*

* 5 T. R. 493.—6 T. R. 582.—2 T. R. 478.

Friday, Dec. 6th.

Case will not lie for libelling a performer

Ashley v. Harrison.

THIS was a special action on the case against the defendant. The declaration stated, That the plaintiff being director of certain musical performances, called Oratorios, had, among other

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ASHLEY v. HARRISON.

other performers, engaged, at a considerable expense, one of the name of *Gertrude Mara*: That the defendant, intending to injure the plaintiff, and to deprive him of the profits of such performance, published a certain false and scandalous libel of and concerning the said Madam *Mara*; in consequence of which she was prevented from singing, from an apprehension of being hissed and ill-treated, from the impression the public mind received from such libel; whereby the plaintiff lost the profits arising from the said *oratorios, to his great injury, &c. The libel charged in the declaration was in the form of queries addressed in the newspaper to Madam *Mara*, charging her with insolence and contempt of the audience, and want of respect to the person of his Majesty at public representations where she performed.

on the stage, who is thereby prevented from acting, whereby the plaintiff lost the profits of her performance.

[*49]

On opening this case on the part of the plaintiff, Lord KENYON threw it out as his opinion that the action was not maintainable: he said, that the injury complained of was too remote, and impossible to be connected with the cause assigned for it, so as to affect the defendant in this form of action: That if the publication was an injury to Madam *Mara*, she might have an action for it; but as her refusing to perform might have proceeded from groundless apprehension of what never might have happened, that the plaintiff should not be at liberty to suggest the libel as the cause of that injury which might have proceeded from another cause, or perhaps from caprice or insolence. But the counsel for the plaintiff suggesting that this might be taken advantage of in arrest of judgment, his Lordship suffered the cause to proceed.

To prove the loss of profits sustained by the plaintiff, from the absence of Madam *Mara* from the performance, a witness of the name of *Brandon*, who was the box-keeper, was called. He was asked, "if, in consequence of Madam *Mara*'s de-"clining to sing, several persons had not given up their "boxes?" The counsel for the defendant objected to this question; and his Lordship ruled, that *the witness might be asked generally, "whether the receipts of the house had not "diminished from the time Madam *Mara* had declined to "sing?" it being stated in the declaration, that in consequence of the libel and Madam *Mara*'s refusal to perform, the plaintiff had lost the profits of the several performances; but that to ask if particular persons had not in consequence given up their boxes, was special damage, and should have been specially

To prove the loss of profits of the theatre from the giving up of boxes, the box-keeper is not an evidence to prove that they were so given up for any particular cause.

[*50]

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specially laid in the declaration. That besides, was it admissible evidence under the general averment, that *Brandon* was not the proper witness to prove it, but the parties themselves who had given up their boxes, as they only could assign the motives which induced them to do so.

His Lordship afterwards recurred to his first opinion, that the action was not maintainable, and nonsuited the plaintiff.

Erskine and *Shepherd* for the Plaintiff.

Mingay and *Bower* for the Defendant.

Same day.

COWAN v. ABRAHAMS and another.

In Trover for a bill of exchange, the defendant must have notice to produce it, or the plaintiff cannot go into evidence of its being in the defendant's possession.

THIS was an action of trover for a bill of exchange, which had been picked out of the pocket of the plaintiff's clerk, and traced to the possession of the defendants.

The declaration stated the bill of exchange, describing it as drawn by *John Harrison* on *Robert* and *Thomas Harrison*, in favour of *Thomas Bentley*, and by him indorsed to the Plaintiff, in the usual form.

The plaintiff proved by his clerk the possession and loss of the bill as described in the declaration.

[51]

Mingay for the defendants, objected to going into any evidence respecting the bill as set out in the declaration, unless notice had been given to produce it, it being an instrument in writing: and the evidence for the plaintiff going to prove the contents of a written instrument.

The counsel for the plaintiff insisted, that it was sufficient for them to give evidence of any instrument which was his property, as described in the declaration, and which had tortiously come to the defendant's possession; and that as any variance between the instrument so set out in the declaration and the true one would nonsuit him, and that evidence was in the power and possession of the defendant, that it could not be incumbent on the plaintiff to call for the production of evidence which might nonsuit him, but that that should lie on the defendant, who could derive so much advantage from it. That the plaintiff could only be called upon to prove the averment in his declaration, which he did by the evidence offered, which described the bill of exchange in the defendant's possession, as laid in the declaration.

Vide *Wilson* v. *Chambers*, Cro. Car. 262.

Lord KENYON said, that though the merits of this case seemed strongly

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strongly with the plaintiff, that the objection was founded on a rule of law not to be departed from, namely, that the best evidence the nature of the case admits of is always to be given: that wherever there is written evidence, parol evidence of its contents is not the best evidence, and is therefore inadmissible; but that if the party in possession of the written evidence will not produce it when called on, that then inferior evidence is admitted, that is parol proof of its contents. That the plaintiff in this was attempting to give parol evidence of the contents of a bill of exchange, without having given any notice to the defendant to produce the original, which he could not do.

The plaintiff was non-suited.

Garrow and *'Espinasse* for the Plaintiff.

Mingay for the defendant.

In the next Term, the plaintiff moved for a new trial, and got a rule; but the Court of *King's Bench* concurred in opinion with Lord KENYON, and therefore discharged it.

DOE ex dem. WOODMASS *v.* MASON. [53]

Same day.

IN ejectment, the plaintiff held by lease under the city of *London*.

Per Lord KENYON, The common seal of the city proves itself.*

* See *Moises* v. *Thornton*, 8 T. R. 303.

SITTINGS AT GUILDHALL, AFTER TERM.

THRESH *v.* RAKE.

Saturday, Nov. 30th.

Where an agreement in writing is to be performed on a certain day, and the parties agree to enlarge the time, a decla-

THIS was an action on the case, brought to recover the penalty for the breach of a special agreement.

The agreement stated in the declaration was, that the defendant had agreed to assign to the plaintiff certain premises, with the fixtures, &c. to be taken at a fair appraisement by brokers to be named on both sides. The appraisement was to be made

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THRESH v. RAKE.

made on the 13th of *August* following. It then averred, among other things, *that the appraisement was made, and performance generally on the part of the plaintiff.

It appeared in evidence, that in point of fact, the appraisement had not been made on the 13th, but on the 14th of *August;* but that was accounted for in this manner. That *Cope,* who was the broker named on the part of the defendant, had not sent the inventory to the plaintiff's broker until the 14th, on which day the plaintiff's broker, with the consent of the defendant's broker, who was acting as agent for him, made the appraisement on the inventory so sent, and that without the inventory it could not be made; so that the delay was caused by the defendant's own default, and performance on the day waived by his agent.

ration on the day stated in the agreement, though the evidence is of a different day, will support the action.

[*54]

Garrow, for the defendant, insisted that this evidence was inadmissible, as it was receiving parol evidence to vary written, and did not support the declaration. That in the written agreement produced in evidence, it was stated that the appraisement was to be made on the 13th of *August,* and the declaration averred performance on that day; whereas the evidence offered on the part of the plaintiff, went to prove that the parties agreed to make the appraisement on the 14th, and it applied only to that day. At all events he contended, that if it was admissible evidence, that the parties had so agreed to enlarge the time when the appraisement was to be made, that that should have been stated, or made the object of a special
[55] count in the declaration; whereas, as the pleadings stood, there was only one count on the agreement, averring the appraisement to have taken place on the 13th, when the evidence proved it to have really taken place on the 14th; and therefore the evidence did not support the declaration.

But it was ruled by Lord KENYON, that the evidence was good and admissible; for that when the parties by consent enlarge the time within which an agreement is to be performed, that it is a continuance of the same contract; and on a declaration on the original contract, performance on the enlarged time is good evidence, and will support the declaration.

Erskine and *Shepherd* for the Plaintiff.

Garrow for the Defendant.

Vid. Littler v. *Holland,* 3 Term Rep. 590. and *Warren* v. *Stagg, ibid. cit.*

SHELDRICK

1793.

SHELDRICK v. ABERY et alt.

SHELDRICK v. ABERY et alt.

Same day.

Trespass *vi et armis* lies for killing the plaintiff's horse, though the injury arose from negligence.

THIS was an action of trespass, for killing the plaintiff's horse.

The evidence was, that the horse was in a stage coach, which which was driving on the proper side of the road. That the defendants were riding in a cart, and driving violently, and had forced the shaft of the cart into the breast of the horse, by which he was killed.

[*56]

*The declaration was in trespass *vi et armis*, "That the defendant with force and arms drove the shaft of a certain cart into the breast of a certain horse of the plaintiff's, by which he died, *&c. &c.*

Garrow, for the defendant, objected: that the action should have been *case*, not trespass *vi et armis*, as the injury arose from the negligence of the defendant in not driving on his own side of the road, so that the injury to the plaintiff being the consequence of the defendant's negligence, that *case* was the proper action for injuries of that nature.

Lord KENYON over-ruled the objection. He said, that the action was brought against the persons who had done the injury: That the injury, from whatever negligence it proceeded, was accompanied with violence, and in its effect immediately injurious; and that trespass *vi et armis* was therefore the proper action.*

Erskine and *'Espinasse* for the Plaintiff.
Garrow for the Defendant.

* Vide *Savignac* v. *Roome*, 6. T. R. 125; and *Tripe* v. *Potter*, 6. T. R. 128. *n.*

[57]

HARDING v. CRETHORN.

Tuesday, Dec. 10.

When a lease is expired, the tenant continues liable to the rent unless he delivers up complete possession of the premises, or the landlord accepts another in his room.

ASSUMPSIT for use and occupation. The case in evidence was, that the defendant had held the premises by lease under the plaintiff; which lease expired in *June*, 1792. During the continuance of the lease the premises had been let to an under-tenant, who had continued in possession after the lease expired; and the question was, Whether he had been accepted by the plaintiff, the lessor, as his tenant, or whether the defendant still continued liable to the rent accrued after the term expired

1793. — HARDING v. CRETHORN.

expired, and during the time the under-tenant had continued in possession?

Per Lord KENYON. When a lease is expired, the tenant's responsibility is not at an end; for if the premises are in possession of an under-tenant, the landlord may refuse to accept the possession, and hold the original lessee liable; for the lessor is entitled to receive the absolute possession at the end of the term. But it may be proved, that the lessor had accepted the under-tenant as his tenant, as by his having accepted the key from the original lessee, while the under-tenant was in possession, by his acceptance of rent from him, or by some act tantamount to it.

What is evidence of the landlord's acceptance of another tenant.

To prove the plaintiff's acquiescence to accept the under-tenant as his tenant when the lease had expired, a paper was produced, which was a notice from the defendant to the under-tenant then in possession, informing him that his (the defendant's) term in the premises was expired; and ordering him to pay his rent in future to the plaintiff as his landlord. This notice was witnessed by the plaintiff himself.

[58]

The counsel for the defendant contended that the circumstance of the plaintiff's having witnessed this notice, was conclusive evidence of his acceptance of the under-tenant in lieu of the defendant.

The having subscribed any paper-writing as a witness, is not sufficient to charge the witness with notice, unless it is proved that he knew the contents.

Lord KENYON ruled, That the merely subscribing an instrument as a witness, should not bind the party, unless there was some evidence that he was acquainted with its contents at the time, as one might subscribe his name merely as an instrumentary attestation without any knowledge of what he had so attested.

On this intimation of his Lordship's opinion, the defendant proved, that the notice had been read over in the plaintiff's presence, and that he had then subscribed it—his Lordship ruled that to be conclusive, and the defendant had a verdict.

Shepherd for the Plaintiff.
Garrow for the Defendant.

[59]

Thursday, Dec. 12.

PHILLIPS q. t. *v.* MENDEZ DA COSTA.

In a declaration on the lottery act, if the plaintiff avers the tak-

THIS was an action of debt, *qui tam*, brought to recover several penalties for insurances in the State Lottery, contrary to the several lottery acts.

The

1793.

PHILLIPS, q. t. v. MENDEZ DA COSTA.

The first count in the declaration stated, That the defendant, in consideration of the sum of 43*l.* 2*s.* had insured a certain number, *viz.* No. 48,790 in the State Lottery, against the statute, &c. whereby he had forfeited, &c.

The evidence in support of this count was, that the witness had insured several numbers with the defendant, the joint premiums upon which he (the defendant) had calculated at 43*l.* 2*s.* so that the premium for each number was only a proportionable part of this sum of 43*l.* 2*s.* which sum he the witness had paid.

ing of a certain sum for the insurance of a number, proof that that sum was given for the insurance of several numbers is a fatal variance.

Garrow for the defendant objected: that this evidence did not support the count; that the count was for insuring a certain number at 43*l.* 2*s.* whereas the evidence proved that that sum was paid for the insurance of several numbers; so that in fact but part of it was paid for the insurance of the number mentioned.

Lord KENYON was of that opinion; and the count was abandoned by the plaintiff's counsel.

The second count in the declaration stated no consideration, but generally, That the defendant had insured a certain number, *viz.* No. 48,799 in the State Lottery of the thirty-sixth day's drawing of that lottery, against the statute, &c. whereby he, &c.

[60]

The witness called to support this count proved the insurance of the number as laid in the declaration, but that he had paid a certain sum as a premium.

A count stating generally that the defendant had insured a certain number in the State Lottery, is not a variance if the witness proves that a premium was paid at the time.

Garrow objected to this evidence as being a variance from the count, which stated "that no consideration had been paid," whereas this evidence proved that a consideration had really been paid.

The counsel for the plaintiff answered the objection, by insisting that the count did not state "that no consideration "had been paid," which would have been a distinct averment; but that it made no mention of any consideration whatever having been given, it merely stating the fact of the insurance: that the paying the consideration, made no part of the offence, which was the insurance of numbers in the lottery, against the provisions of the statute; that that offence having been proved, the plaintiff had proved the only material averment which the count contained, and precisely as laid.

Lord KENYON said, that the evidence did not vary from the

 count:

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count: that a variance must be of something material: that here the declaration stated merely, that the defendant had made an insurance contrary to the lottery acts; that what the witness had added, did not vary the averment; as the stating the premium was no part of the offence which was making the insurance, which the witness had proved.

Bearcroft, *Shepherd*, and *Barrow* for the Plaintiff.

Garrow for the Defendant.

[61]

Same day.

NEAL *v.* IRVING.

When one person subscribes a policy with the name of another, proof of his having done it in many instances is sufficient to charge him whose name is so subscribed, without producing any power of attorney.

ASSUMPSIT on a policy of insurance underwritten by the defendant on a ship from *Lynn* to *Weymouth*.

To prove the subscribing of the defendant's name to the policy, the broker who had negociated the policy was called. He proved that the defendant's name on the policy had been subscribed by one *Hutchins*. He was asked by what authority *Hutchins* had done it. He said, he did not know; but that *Hutchins* was in the constant habit of subscribing policies in the name of *Erving*, and had done several for him and for others, to his knowledge.

Erskine, for the defendant, objected to this evidence, on the ground that *Hutchins* must have done it by power of attorney from the defendant, which might have been limited, or for a particular purpose, and therefore that it should have been shewn that *Hutchins* was properly authorised, by producing the power of attorney.

Lord KENYON over-ruled the objection, and held that the acts of *Hutchins* held him out to the world as properly authorised; and his having subscribed several policies in the defendant's name, was sufficient evidence of that authority in order to charge the defendant: that if *Hutchins* was only a particular agent for the defendant, that it lay on him to shew it, not the plaintiff.

Mingay and *Shepherd* for the Plaintiff.

Erskine and *Law* for the Defendant.

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Friday, *Dec.* 13th.

REX *v.* MUNTON.

Offences committed out of *England* are cognizable

THIS was an information filed by the Attorney General against the defendant, who was the principal store-keeper at *Antigua* in the *West Indies*, for several misdemeanors.

The

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REX
v.
MUNTON.

The principal charge upon which the information was founded was, that he had purchased in *England* certain stores of *Whitehead* and Co. at a certain nominal price agreed upon between them, which price he charged to Government in his returns to the *Navy-Office;* and that by collusion between him and *Whitehead* and Co. the latter had made to him a considerable allowance in such nominal price; which allowance he reserved to his own use; by which Government were defrauded to a large amount.

[...] by the court of King's Bench, unless there is a special act of Parliament for the purpose of giving them jurisdiction.

These facts were clearly proved by a witness on the part of the Crown.

Erskine, for the defendant, then took an objection to the jurisdiction of the court, and insisted that it had none over the offence as proved. He said that the evidence had proved the criminal matters to have been wholly done and completed in the *West Indies*, and that therefore without an express statute to authorize it, that the court of King's Bench could not take cognizance of matters committed out of the realm. He instanced the *East India* Bill, which had been passed expressly for the purpose of giving the Court of King's Bench, jurisdiction of eastern delinquency. [63]

But if any part of the offence has been complete in *England*, the court of K. B. then has jurisdiction.

Lord KENYON assented to the objection respecting the jurisdiction of the Court, where the criminal matter arose wholly abroad, and agreed that in such case, to warrant the interposition of the Court of King's Bench, that an act of Parliament was expressly necessary: that, however, in the present case, it appeared that the several false charges made by the defendant by which he had defrauded Government, had been in the several returns made by him from *Antigua* to the Navy-Office in *London*. His Lordship therefore said, that there was thereby an offence committed in *London* where such false returns were received, and where the fraud had been complete by their having been there allowed, upon which the jurisdiction of the Court attached; and he therefore over-ruled the objection.

A question then arose, Whether, as the information should have laid the offence within the proper county, the Navy-Office was in the city of *London*, where the information had laid the *venue*, and where the trial was had?

Lord KENYON said, that if the books of the Navy-Office which concerned the transaction upon which the information was grounded, had even come into *London*, that he should hold that sufficient to give the Court jurisdiction.

The

1793.

Rex v. Munton.

The *Solicitor General*, *Bearcroft*, *Bower*, and *Baldwin* for the prosecution.

Erskine, *Garrow* and *Wood* for the defendant.

The defendant was found guilty, and was brought up the following term to receive the judgment of the court; but it being an offence of a very serious nature, he was remanded, and the sentence of the Court has not yet been pronounced.

Yarker v. Botham *et alt.*

The commissioners of bankrupt may make a verbal order for the payment of his expenses to a person whom they have summoned to attend them, and it shall be recoverable in assumpsit.

THE declaration in this case stated, "That a commission of bankrupt having issued against one *Thomas Cooper* and one *John Brown*, both of *Lancaster*, under which the defendants had been chosen assignees, that a summons, signed by the major part of the Commissioners named in the Commission, was served as upon the plaintiff, requiring him to attend the said Commissioners. That the plaintiff did attend, in pursuance of such summons, and was then and there examined: That the plaintiff was put to great expense in coming from *Lancaster*, for the purpose of so attending the Commissioners, and that they had ordered a certain sum of money to be paid to him for such expenses; for which sum the action was brought.

[65] By stat. 1 *Jac.* I. *c.* 15. § 10, power is given to the Commissioners to summon persons having, or suspected to have or detain, any part of the property of the bankrupt, and to examine them respecting it: and, by § 11 of the same statute, "Such witnesses so sent for shall have such costs and charges as the Commissioners in their discretion shall think fit to allow."

The evidence in this case proved the attendance of the plaintiff, and that having made a demand of his expenses before the Commissioners, they settled the sum to be allowed for the purpose: that *Botham* the defendant was present, and took an account of the plaintiff's demand, and promised to pay it.

This was the only evidence offered to support the action.

The counsel for the defendant insisted, that it was not sufficient to sustain the action: that the claim was under a proceeding before Commissioners of Bankrupt: that their proceedings were in writing, and that therefore an entry in writing in the proceedings to the effect set up by the plaintiff, should

should be shewn, in order to intitle him to recover; whereas this was only by parol. 1793.

YARKER v. BOTHAM. et alt.

They further contended, that the plaintiff being himself a creditor, was bound to attend the Commissioners on their summons, and therefore could not claim an allowance for what he was bound by law to do.

Lord KENYON over-ruled both objections. He said, that the act of Parliament having given the Commissioners a power to allow any person his expenses whom they had called upon to attend them, that the order in the present case was made in pursuance of that authority, and that it was not necessary that it should be in writing. [66]

The Plaintiff had a verdict.

Law and *Barrow* for the Plaintiff.

Erskine for the Defendant.

Saturday, Dec. 14th.

JOURDAINE (Assignee of NOWLAN a Bankrupt) *v.* LEFEVRE and others.

Bankers have a lien upon bills or notes paid into their houses for the balance of a general account.

TROVER for a promissory note, brought by the plaintiffs as assignees of the bankrupt, against the defendants, who were bankers.

The defendants had been bankers to *Nowlan* the bankrupt. The note in question had been paid into the defendant's house by *Nowlan* the day before he committed the act of bankruptcy, and wrote short in his cash-account with the house. At that time there was a balance in favour of the bankrupt to the amount of 2*l.* 15*s.* [67]

The bankrupt, besides his keeping cash with the defendants, had also a discounting account with them; and about a month previous to his bankruptcy they had discounted for him fifteen bills, five of which had turned out to be bad ones. The defendants insisted on their right to hold the note in question, to indemnify them against the loss they should sustain from the bad bills they had so discounted.

Lord KENYON was of opinion that a banker in a transaction such as the present, had a lien on a note so paid in, and of course a right to retain it for his balance, or as security for a general account between him and the party who had paid it in; and though in the present case the discounting and cash-ac-

counts

1793.

JOURDAINE (Assignee of NOWLAN a Bankrupt) v. LEFEVRE and others.

Q. If the wife of a bankrupt may be a witness to prove a payment to have been made in contemplation of a bankruptcy.

counts were distinct and separate, that there being a balance due to the defendants, they might retain generally, in order to cover it.

The bankrupt's wife was called, to prove that the note had been paid in to the defendants, in contemplation of a bankruptcy. Her competency was objected to, on the ground that she came to increase the dividend by her testimony, and of course the allowance to the bankrupt.

[*68]

*Lord KENYON thought that she was indifferent, inasmuch as, if the plaintiff recovered in this action, the defendants would be creditors against the bankrupt's estate to the amount of the note, on account of the deficiency of the discounted bills.

Erskine and *Park* for the Plaintiff.

Bearcroft and —— for the Defendants.

Thursday, Dec. 19th.

WHITWELL and other Assignees of STEVENS and HATTERSLEY, Bankrupts, *v.* THOMPSON.

A conveyance by deed to a child, though declared to be void under stat. 1 *Jac.* I. if made when a trader is insolvent, is fraudulent, and an act of bankruptcy.

THIS was an action of trover brought by the plaintiff to recover two leases, which had belonged to the bankrupts, and were then in the defendant's possession.

The transaction under which the defendant had obtained possession of them was as follows:—The defendant had been in the habit of lending the bankrupts his acceptances for their accommodation; but in the month of *June*, 1789, suspecting their solvency and the state of their affairs, and insisting upon some security, the two leases in question were lodged in his hands for that purpose, on the 10th of *June* of that year; at the same time, a memorandum was made and signed by *Hattersley*, one of the bankrupts, in the name of the partner-

[69]

ship, stating, "that *Thompson* the defendant having for their accommodation accepted two bills, one of 550*l.* and the other of 746*l.* that they had lodged in his hands as a collateral security the two leases in question; and in case he was obliged to pay those bills, that he should be at liberty to dispose of them for his reimbursement."

The defendant having been obliged to provide for these bills, insisted that he had a right to hold the leases in question for his indemnity. The plaintiffs contended, that the leases were so deposited by the bankrupts, after an act of bankruptcy committed

committed, and with a view of preference, to the prejudice of the creditors at large.

*To establish an act of bankruptcy prior to this transaction, the plaintiffs gave in evidence, first, a voluntary surrender or assignment of their shop, effects, and trade in *Whitechapel*, to *John* and *William Stevens*, sons of one of the bankrupts, one of whom was just 21, and the other a minor, and in *America*.

This surrender was by a memorandum in writing, written by *Hattersley*, and subscribed by him in the name of the partnership, purporting to be "an agreement in them to sell to *J.* and *W. Stevens* all their stock in trade, fixtures, *&c.* at a fair appraisement, and an adjoining house in consideration of 51 guineas;" but this agreement was not signed by *John* and *William Stevens*. It was dated 29th of *May* 1789. [70]

This agreement, though fraudulent as against creditors, was admitted not to be an act of bankruptcy, it not being by deed.

The counsel for the plaintiffs then gave in evidence a deed dated 30th of *May*, 1789, by which *Stevens*, one of the bankrupts, gave to *Hattersley* and his wife (who was daughter to *Stevens*) certain freehold premises then in mortgage to him, for 700*l.*; and also certain copyhold premises, to which he had been admitted, to them for ever; but as to the estate of *Hattersley*, in trust for the sole and separate use of his wife, with a covenant that he (*Stevens*) would at any time surrender to the above mentioned uses.

This conveyance being by deed, and not made in pursuance of any agreement before marriage, and at a time when the partners were proved to be insolvent, was contended to be a clear act of bankruptcy; and being prior to the 10th of *June* when the leases in question were deposited, that it overreached that transaction.

Bower for the defendant contended, that it was not an act of bankruptcy; that the statute 1 *Jac.* I. 15. § 5, having declared all conveyances by the bankrupt to his children to be void, that it would be nugatory to declare the making of such conveyances to be also an act of bankruptcy, which would of itself avoid all conveyances so made. That the statute had enumerated expressly several things which are acts of bankruptcy; but in the case of an assignment to a child, such as the present, only declared it to be void.

Lord KENYON was of opinion that the clause of the statute mentioned, was perfectly rec[illegible] with those which are [71]

declaratory

1793.

Whitwell and other Assignees of Stevens and Hattersley, Bankrupts, v. Thompson.

declaratory of what are acts of bankruptcy. That the stat. 1 *Jac.* I. *c.* 15, having declared the making of any fraudulent grant or conveyances an act of bankruptcy, had not said that the making a voluntary and void one should not be an act of bankruptcy: that the distinction was, that if the conveyance to a child was voluntary and inconsisient with the provisions of the statute, but not fraudulent, that it was merely void; but that if it was fraudulent, that it was an act of bankruptcy.

Where one partner makes a fraudulent grant by deed to another partner, it is an act of bankruptcy in the former, but not in the latter.

His Lordship having declared his opinion respecting the operation of the deed, *Erskine* contended that the transactions proved amounted to acts of bankruptcy in both parties: in *Stevens*, by the agreement jointly with *Hattersley* to assign to his sons, and by the assignment by deed to his daughter; and in *Hattersley*, by his joining in the assignment, by taking that property to the sole and separate use of his wife, which if not so disposed of, would have belonged to the creditors, whom by such deed he had defrauded.

Lord Kenyon was of opinion that the agreement and assignment coupled together amounted to evidence of an act of bankruptcy in *Stevens* the grantor, by whom the deed had been made, but not in *Hattersley*.

An act of bankruptcy was then proved to have been committed by *Hattersley* in the month of *August* of the same year.

Where two partners join in assignment of any property as a security for a debt, one of whom has at the time committed an act of bankruptcy, it is void as to a moiety only.

It then became a question, How far the deposit of the leases in question should be affected by the acts of bankruptcy so proved?

[*72]

* The counsel for the defendant abandoned all claim to the moiety claimed under *Stevens*, the act of bankruptcy in him being established on the 30th of *May*, which preceded the delivery of the deeds to the defendant, which was on the 10th of *June*; but they contended that they had a right to hold them as to *Hattersley's* moiety, his bankruptcy not having taken place till in the month of *August* following.

They then gave in evidence that the defendant had frequently assisted the bankrupts with money previous to the 10th of *June*; and that then being pressed by them for further assistance, that he had done it on condition of receiving security for his indemnity; and that the leases in question were given to him for the express purpose of indemnifying him; and that at the time he so received them, that he was in fact under the two acceptances mentioned in the memorandum of agreement between them.

Lord

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WHITWELL and other Assignees of STEVENS and HATTERSLEY, Bankrupts, v. THOMPSON.

Lord KENYON in his charge to the Jury said, that all the cases, without a single exception, where the assignment of his property by a trader had been deemed fraudulent, and an act of bankruptcy had been where it had been given for a by-gone and before-contracted debt; but that it never could be taken to be law, that a trader could not sell his property when his affairs became embarrassed, or assign them to a person who would assist him in his difficulties, as a security for any advances such person might make to him. This was the case, provided such trader had not committed any act of bankruptcy [73] at the time he so disposed of his property, as by reason of it all dominion which he had over his property was completely at an end. That in the present case the defendant had fairly taken the leases in question, and, under the circumstances proved, was entitled to hold them, as against the assignees of that partner who had, at the time, not committed any act of bankruptcy; so that he therefore was entitled to a moiety of the leases in question: that as that gave him a title to hold the leases, that the defendant must have a verdict, but subject to the claim of the assignees for the other moiety.

Erskine, *Mingay*, and *Baldwin* for the Plaintiff.

Bowser, *Garrow*, and *Shepherd* for the Defendant.

THELLUSON v. FLETCHER.

Saturday, Dec. 21.

Where a ship sustains a partial loss, the insured cannot abandon, nor is the answer of the underwriters, desiring them "to do the best they can with the damaged property," evidence of their assent, so as to make it a total loss.

THIS was an action brought to recover the amount of the defendant's subscription to a policy of insurance on 42 hogsheads of sugar, shipped on board a vessel from *Ostend* to *Havre*. The plaintiff went for a total loss.

The vessel sailed from *Ostend*, but was forced on shore, and the cargo damaged. The assured wrote to the underwriters, to inform them of the circumstances, and of the particulars of the injury *the sugars had sustained. The letter was shewn to the underwriters by the broker; they in answer desired, "That the assured would do the best they could with the damaged property."

Erskine, for the plaintiffs, the assured, contended, that their letter to the underwriters, and the directions given by them in consequence of the letter, was an abandonment by the assured, [*74] and an assent to it by the underwriters; and that they therefore were entitled to recover for a total loss.

Lord

1793.

THELLUSON v. FLETCHER.

Lord KENYON said, that the loss appeared to be but a partial one, and that the assured could not by their own act turn it into a total one. That it was the interest of the underwriters to make a partial loss as light as possible; and that it was the duty of the assured to do so: and that this was the meaning and import of the letter.

The plaintiff was nonsuited.

Erskine, Bower, and *Giles* for the Plaintiff.

Law for the Defendant.

[75]

Same day.

WILKINSON v. COVERDALE.

Case will lie where a party undertakes to get a policy done for another therein, without any consideration, if the party so undertaking it takes any steps for that purpose, but does it so negligently, that the person has no benefit from it.

THIS was a special action on the case, against the defendant for negligence.

The declaration stated, That the defendant had undertaken to procure an insurance against fire for certain premises belonging to the plaintiff, and on his account, which insurance he had effected, but that he had conducted himself so negligently in the perfecting such insurance, that the premises having been burned by fire, that the plaintiff had not been able to recover any part thereof against the fire-office; whereby he had suffered a total loss.

The case as stated on the part of the plaintiff was, that he had purchased the premises in question from the defendant in the month of *August*, 1792; the defendant at that time had a subsisting policy from the *Phœnix* Fire Office from *December*, 1791 to *December*, 1792; that the defendant had undertaken to get this policy renewed on account of the plaintiff, and in fact had renewed it and charged a sum of 16*l.* as the premium paid; but that it being necessary where a party who has an insurance standing in the office, assigns or mortgages his interest in the premises insured, that an indorsement should be made on the policy testifying such matter, and allowed at the office by some of the acting members of the company; that the defendant had neglected to have this assignment and allowance made at the office; in consequence of which the [76] plaintiff was precluded from having any remedy on the policy against the office, and had sustained a total loss.

It was admitted on the part of the plaintiff, that there was no consideration whatever moving from him to the defendant

for

for this undertaking to get the policy on his account, but that the defendant had undertaken it gratuitously on the plaintiff's account.

On this circumstance being admitted, Lord KENYON expressed a doubt, whether any action could be maintained on such an undertaking.

Erskine, for the plaintiff, cited a manuscript note of a case decided at *Nisi Prius* before Mr. Justice BULLER, of *Wallace* v. *Tellfair*, wherein that Judge had ruled in an action similar in point of circumstances with the present, That though there was no consideration for one party's undertaking to procure an insurance for another, yet where a party voluntarily undertook to do it, and proceeded to carry his undertaking into effect by getting a policy underwritten, but did it so negligently or unskilfully, that the party could derive no benefit from it, that in that case he should be liable to an action: he then contended, that the defendant in the present case had brought himself within the rule so laid down by the learned Judge, he having effected the policy; but by his negligence in not procuring the allowance at the fire-office on the assignment of the premises, that the plaintiff had lost all benefit from it.

Lord KENYON acquiesced in the distinction, and suffered the cause to proceed. [77]

The plaintiff failed in proving any promise of the defendant to procure the insurance as stated in his case, and was nonsuited.

Erskine and *Gibbs* for the Plaintiff.

Law, *Chambré*, and *Park*, for the defendant.

THELLUSSON *v.* BEWICK.

In a policy of insurance, the underwriter does not insure against any loss that may arise from the difference of exchange.

ASSUMPSIT to recover the amount of the defendant's subscription to a policy of insurance on ninety-four casks of sugar.

The sugars had been shipped on board the ship *Ami*, from *Havre* to *Ostend*. She sailed from *Havre*; but had not proceeded far on her voyage when the loss took place. The plaintiffs went as for a total loss, with the benefit of salvage to the underwriters.

The question in the case was, Whether the insurers were liable on the difference of exchange?

The

1793. THELLUSSON v. BEWICK. [*78]

The policy had been underwritten in *September*, 1791; the *exchange was then at 24*d.* on the *French* crown of three livres; soon after which the loss happened. Part of the cargo was saved, and sold at three months' credit; and of course was to be paid for in *January*, 1792.

Before the several payments were made by the underwriters, the exchange on the *French* crown of three livres had fallen successively from 24, as it stood at the time of making the policy, to 15 and 7 3-4ths, at which rate the underwriters were ready to pay.

For the plaintiff it was contended, that the payment should be at the rate of 24*d.* on the *French* crown of three livres. That a policy of insurance was a contract of indemnity; and that unless the payment was at that rate, that he would not stand indemnified under the policy.

Lord KENYON said, that nothing was clearer than that the insurers did not insure against the debasement of the coin. That the question therefore of the rise or fall of exchange was entirely in this respect out of the province of the jury to decide on in the present question. That in case the exchange had risen, that the insured would have had the benefit of the rise, and therefore, in case of a fall, should submit to the loss.

Erskine and *Baldwin* for the Plaintiff.

Law for the Defendant.

CASES

ARGUED AND RULED

AT

NISI PRIUS,

IN THE

KING'S BENCH;

HILARY TERM, 34 GEO. III.

FIRST SITTING IN TERM, AT WESTMINSTER. 1794.

Tuesday, Jan. 28th.

Kirk *v.* French. [80]

In an action of malicious prosecution, a Judge's order to stay proceedings in the first suit on payment of costs, and proof of such payment, is not sufficient evidence that the first suit is at an end.

THIS was an action of malicious prosecution against the defendant, for maliciously arresting and holding the plaintiff to bail for 800*l.* in an action of trover, when the defendant had no cause of action.

The declaration contained the usual averment, "that the "former action was determined, and at an end."

To prove this, the counsel for the plaintiff produced a Judge's order to the following effect:—

French v. *Kirk.* "It is ordered by the consent of both parties, "that upon payment of costs, to be taxed "by the Master, all further proceedings in "this cause shall be stayed," *&c. &c.*

And they then were proceeding to prove by a witness the payment of these costs as taxed by the Master in that action, contending, that as the proceedings were under the Judge's order to be stayed on payment of the costs, that proof of the payment of the costs was a proof of the stay of proceedings, and that the suit was at an end.

Mingay

1794.

Kirk v. French.

Mingay, for the defendant, insisted, that this proof was insufficient; that it was substituting deduction for positive fact. That the suit should be shewn to be at an end by producing a judgment of *non pros*, or some positive evidence of that sort.

Erskine said, that there were no proceedings on the record, and therefore they could produce no judgment of *non pros*. That the Judge's order was at first conditional, to stay the
[81] proceedings on payment of costs; but that when the costs were paid, it then became absolute, and the suit completely at an end.

Lord Kenyon said, That the inclination of his mind was, that the evidence was insufficient, as the evidence offered did not seem to be the best the nature of the case admitted of. But from some circumstances which appeared in the case, he recommended it to both parties to withdraw a juror.—To which intimation they agreed.

Erskine, *Garrow*, and *Morgan*, for the Plaintiff.

Mingay for the Defendant.

SECOND SITTING IN THE KING'S BENCH, IN TERM, AT WESTMINSTER.

Monday, Feb. 3.

Bowman *v.* Nicoll.

Every alteration in an instrument requiring a stamp, makes it a new instrument, and requires a new stamp.

ASSUMPSIT by the indorsee, to recover the amount of a bill of exchange against the acceptor.

The bill was drawn the 2d of *September*, 1793, payable twenty-one days after date. While the bill remained in the hands of the drawer it was altered with the consent of the acceptor, and made payable fifty-one days after date: on the 30th of *September*, when it was over-due, according to its original tenor and date, it was again re-altered to twenty-one days, and the date changed from the 2d to the 14th of *Sep-*
[82] *tember*: after this it was negotiated, and the action brought on it: but in the several alterations the old stamp remained, nor was there any new stamp affixed.

Lord Kenyon was of opinion, on these facts appearing, that the plaintiff must be non-suited; as every alteration in any instrument requiring a stamp made it a new instrument,

and

and a new stamp necessary. He therefore nonsuited the plaintiff.*

1794.

BOWMAN v. NICOLL.

Erskine and ——— for the Plaintiff.

Mingay and *Russell* for the Defendant.

The next term the plaintiff moved for a new trial; but the court concurred in opinion with the Chief Justice.—*Vid. Stonelake* v. *Babb*, 5 *Burr*. 2673; and S. C. 5 Term Rep. 537.

* Vide *Trapp* v. *Spearman*, post, 3 vol, 57.

LAST SITTING IN TERM, AT GUILDHALL.

[83]

SOLOMONS *v.* DAWES.

Tuesday, Feb. 11.

Where in an action of trover the demand of the goods is not made by the party himself, a refusal, on the ground that the party applying is unknown, or not properly authorised, is not sufficient to support the action.

TROVER for a box and jewels.—The demand had been made by the plaintiff's wife. The defendant had detained them till paid a demand he set up against the plaintiff for lodging.

Per Lord KENYON. In an action of trover, where the demand of the things for which the action is brought, is not made by the plaintiff himself, who is the owner, but by another person on his account, and the defendant refuses to deliver them, on the ground that he does not know to whom the things belong, and therefore keeps them till that is ascertained: or that the person who applies is not properly empowered to receive them; or until he is satisfied by what authority he applies,—that shall not be deemed such a refusal as shall be evidence of a conversion sufficient to support this action.*

Mingay and *Marryat* for the Plaintiff.

Garrow for the Defendant.

*Vide *Coore* v. *Callaway*, post, 115.

[84]

KNIBBS *v.* HALL.

Same day.

Where a party threatened with a distress for rent pays money, against the payment of which he

THIS was an action of *assumpsit* for use and occupation of certain rooms in the City Chambers. Plea of the general issue, with notice of set-off.

One article of the set-off which the defendant proposed to give in evidence arose in the following manner:—the defendant

1794.

KNIBBS v. HALL.

might legally have defended himself, but does not do it, this shall not be deemed a payment by compulsion, nor shall he be allowed to set it off against another demand.

fendant being indebted to the plaintiff for the rent of other chambers belonging to the plaintiff, which he then occupied, the plaintiff demanded payment, at the rent of 25 guineas per year. The defendant insisted that he had taken them at 20 guineas per year only, and offered to pay at that rate. The plaintiff refused to take it, and threatened to distrain if not paid at the rate of 25 guineas; and the defendant, in order to avoid the distress, paid at that rate, and now brought a witness to prove that the chambers for which he had paid at the rate of 25 guineas, were really let at 20 guineas; so that he had overpaid the plaintiff, and now proposed to set off the overplus, as having been paid by compulsion, and in his own wrong.

Lord KENYON was of opinion, that this could not be deemed a payment by compulsion, as the defendant might have by a replevin defended himself against the distress; that therefore after a voluntary payment so made, that he should not be allowed to dispute its legality; and therefore rejected the evidence.*

Garrow and ——— for the Plaintiff.

Erskine for the Defendant.

* Vide *Brown* v. *M'Kinally*, post, 279.

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[85]

SITTINGS AFTER TERM, IN THE KING'S BENCH, AT WESTMINSTER.

Saturday, Feb. 15th.

A person whose name is on a bill as indorser, cannot be a witness to prove a property in it in himself, and that it was indorsed to the plaintiff without consideration.

BUCKLAND v. TANKARD.

ASSUMPSIT by the plaintiff, as indorsee of two bills of exchange, against the defendant as the acceptor.

The bills had been drawn by one *Gregson*, in his own favour, and by him indorsed to the plaintiff. His hand-writing was proved, and that of the defendant, the acceptor; upon which the plaintiff rested his case.

The defence upon which the defendant relied was, that the bills in question were accommodation-paper between *Gregson* and him; and that that circumstance was known to the plaintiff, who beside that, had given for them no value whatsoever.

Gregson

1794.

BUCKLAND v. TANKARD.

Gregson the indorser was called as a witness, he having been released. The evidence given by him was, that he having *accepted two bills of exchange for *Tankard* the defendant, that *Tankard* had accepted the two bills in question to the same amount for him, as a counter security. He said, that being unwilling to press *Tankard*, or to sue him in his name, that he applied to the plaintiff, informing him of the circumstances, and requested that he would take the bills, and pretend to *Tankard* that they had been indorsed to him for a good consideration; and to threaten to sue him if they were not paid: that the plaintiff consented, and that he then indorsed them; so that the plaintiff took them under the circumstances mentioned, and had never given to him any consideration for them whatever, but had commenced the present action in breach of the agreement so made with the witness; and that the bills still remained *bona fide* his property. [*86]

Lord KENYON then stopped the witness, and said that the evidence was inadmissible; as he claimed a property in the bills himself.

Erskine for the defendant contended, that as to the event of this suit, he was indifferent, as it respected the defendant only; but that at all events the release gave him complete competence.

His Lordship said, that he had an interest in the present action, upon which the release could not operate; for that if the plaintiff succeeded in the present action, that the bills were *functi officio*, in which case they were lost to him, as he could never derive any benefit under them; but that the effect of his testimony, if believed, went to defeat the plaintiff's action, by which means the bills would remain entire and undischarged, and belong to him; so that by impeaching the plaintiff's title to the bills, he set up his own, and was therefore interested. His testimony was therefore rejected, and the plaintiff recovered. [87]

Garrow and *Leycester* for the Plaintiff.

Erskine for the Defendant.

In the next term a new trial was moved for in this cause and the rule discharged.

1794.

MURRAY v. DURAND. *Same day.*

In an action against the Sheriff for not assigning a bail-bond, when the bail has been put in and justified after the action brought, and the plaintiff has not moved to set it aside, it is a complete bar to the action.

[88]

MURRAY *v.* DURAND.

THIS was an action on the case, against the defendant as sheriff of the county of *Surry.*

The declaration contained two counts; the first for an escape, the second was for not assigning the bail-bond.

The evidence on the plaintiff's case was, That the plaintiff having sued out a bailable writ against one *Bland,* returnable the first return in *Michaelmas* term (6th of *November)* that bail should have been put in, by the practice of the court, in six days; that is, on the 12th: That the plaintiff on the 13th searched to see if any bail had been put in; and finding none, applied for an assignment of the bail-bond, when it appeared in fact that no bail-bond had been taken; upon which he commenced the present action.

The counsel for the defendant said, that bail had been put in; and produced the rule for the allowance of bail in the cause; and insisted that that was a complete answer to the present action.

It appeared, however, that the bail had justified on the last day of *Michaelmas* term; and the plaintiff's counsel contended, that this being after the commencement of the plaintiff's action, when a right of action had attached in the plaintiff, that it could not be barred by it.

But *per* Lord KENYON. By the rule now produced, it appears that the defendant has satisfied the exigence of the writ, bail above being put in, and having justified, that is now subsisting-bail, and must be taken *nunc pro tunc.* This therefore being an action in fact for not taking a bail-bond, is falsified by the rule now produced; and therefore I am of opinion that the action is barred. The plaintiff should have applied to have set aside the justification of the bail, as while it subsists, the action is not maintainable.

His Lordship therefore directed the plaintiff to be called; but with liberty to the plaintiff's counsel to move to set the nonsuit aside.*

Erskine, Russel, and *Lawes,* for the Plaintiff.

Bower, Garrow, and *Manley* for the Defendant.

The plaintiff did not move for a new trial.

* Vide *Pariente* v. *Plumbtree,* 2 B. & P. 38. this case there cited by *Heath,* J.

JOHNSON

1794.

JOHNSON v. MASON. Monday, Feb. 17th.

JOHNSON v. MASON.

THIS was an action of replevin. The defendant made conusance; first, under Lord *Stamford*; and secondly, under one *Ballard*, for rent arrear.

The premises for the rent, of which the distress had been made, had been limited to a Mrs. *Doherty* for life, remainder over. This remainder over had vested by purchase in Lord *Stamford*. Mrs. *Doherty*, the tenant for life, was dead; so that at the time of the distress taken, Lord *Stamford* was seised in fee in possession.

Mrs. *Doherty* in her life-time having no power to make leases, had nevertheless demised the premises by lease to *Ballard*, for twenty-one years. She died before the lease expired; and *Ballard* paid his rent to Lord *Stamford*, and continued in possession, though his lease was void; and soon after, in consideration of 500*l*. paid to him by the plaintiff, let to him the premises for the unexpired remainder of the twenty-one years.

A party who has executed a deed, shall not be permitted to acknowledge it: it must be proved by the subscribing witness.

Mrs. *Ballard*, wife to *Ballard*, the lessee, was called as a witness.

Erskine for the plaintiff, produced the deed by which her husband had demised the premises to the plaintiff, which she had executed as attorney for her husband, and asked her if she had so executed it.

Garrow for the defendant objected to the question, until the deed was proved by the subscribing witness.

[90]

Lord KENYON said, that Lord MANSFIELD had once by surprise allowed a man to acknowledge his own deed in court, without calling the subscribing witness; but that he afterwards changed his opinion, and held that a party should not be allowed to acknowledge his deed, until it had been proved by the subscribing witness.

The deed was then proved in that manner.

When a party executes a deed under a power of attorney, the power of attorney ought to be produced.

Erskine was then proceeding to ask her some questions arising out of the deed. This was objected to, unless her power of attorney was produced, she having executed the deed by virtue of such power.

Lord KENYON ruled it to be necessary that the power of attorney should be produced.

The circumstances of the case then given in evidence were, that,

1794. — JOHNSON v. MASON.

that, at the time when the lease was made to the plaintiff, that he was informed by the witness that the premises were held under Lord *Stamford;* and at the same time that all the receipts which *Ballard* had taken for rent paid at different times to Lord *Stamford* were delivered to him.

The plaintiff's counsel contended that the defendant should shew some title in Lord *Stamford;* as in case the action had [91] been ejectment, without such evidence the plaintiff could not recover.

Where a tenant has, on coming into possession under an assignment, had notice that the lease was held under any particular person, to whom the former tenant has paid rent, the title of this person cannot be contested in an action of replevin.

Lord KENYON said, that in this case it appeared that the plaintiff, at the time of taking the lease, had notice that the premises belonged to Lord *Stamford:* That however it might be in ejectment, that in this case there was no defence; and he doubted if there would be any in ejectment: That in replevin, receipt of rent was title: That *Ballard* confessedly held under Lord *Stamford,* and he had informed the plaintiff of that circumstance, who took the premises subject to that rent; and therefore if distrained on by the person subject to whose claim of rent he took the premises, that he could not in this action contest it.

The defendant therefore had a verdict.

Erskine and *Wigley* for the Plaintiff.

Garrow for the Defendant.

Same day.

BERNARD *et alt.* v. REED.

If a foreign merchant sells abroad contraband goods knowing they are to be smuggled into this country, and assists in the smuggling, he cannot recover the value of them.

ASSUMPSIT by the plaintiffs, who were foreign merchants living at *Lisle,* to recover the value of a quantity of lace, sold by them to the defendant.

The defence was, that the goods were contraband, purchased from the plaintiffs for the purpose of being smuggled into *England;* which circumstance was well known to the plaintiffs, who for that purpose packed up the lace in a particular manner, for the purpose of more convenient carriage, and which, it was proved, was different from their usual mode of packing it when it was not to be smuggled.

It was admitted that the plaintiffs were foreigners. The [92] counsel for the plaintiffs cited the case of *Holman* v. *Johnson, Cowp.* 341, and relied that the contract having been made abroad, and the delivery there complete, that the case was strictly

strictly in point; and that it had been laid down by Lord MANSFIELD that foreigners were not bound by the revenue laws of this country.

Lord KENYON said, he had considerable doubts on the case; and whether, in case it appeared that the plaintiffs, though foreigners, knew that the goods were to be smuggled, that they should be allowed to recover; and therefore wished the jury to find whether the plaintiffs knew of the circumstance or not.

Mingay cited a case, said to have been ruled by Mr. Justice BULLER, that in an action for wheat sold at *Dunkirk* by a foreigner, that the foreigner having assisted in smuggling it into *England*, that he could not recover.

The jury found a general verdict for the plaintiffs; but the next cause turning on the same point, they found the matter specially.—In the next term that cause came on to be argued, and the court held that the plaintiffs could not recover.

Erskine and *W. Best* for the plaintiffs.

Bower for the Defendant.

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WILLIAMS *v.* SHAW.

Monday, Feb. 17th.

If a mortgagee uses timber on the mortgaged premises which has been furnished to the mortgagor but not paid for, he shall be liable, though he is afterwards evicted.

TROVER for a quantity of timber.—One *Powell* was lessee of certain ground upon which he had begun to build several houses, and the timber had been furnished by the plaintiff.

Powell, before the houses were finished, and before the timber had been used, mortgaged the premises to the defendant, and soon after became a bankrupt.

The defendant entered on the premises, and continued the buildings, and worked up part of this timber which he had found on the premises into the houses.

The plaintiff brought trover for it; and the defence set up by the defendant was, that the assignees of *Powell* having discovered an act of bankruptcy previous to the mortgage, he had been forced to give up his mortgage-deed; and that the assignees were now in possession of the premises.

Lord KENYON said, that however hard the case might be, that if *Shaw* the defendant had given any orders for using the timber while he was in possession under the mortgage, and before

1794. WILLIAMS v. SHAW.

before the assignees had evicted him, for so much he was liable as had been used by his order and direction.

The plaintiff proved part so worked up by his orders; and had a verdict.

[94]

Erskine and *Park* for the Plaintiff.

Mingay for the Defendant.

DOE ex dem. PARRY v. HAZELL.

Tuesday, Feb. 18th.

EJECTMENT for an house.—The defendant had taken the house by the month; and a month's notice to quit had been given.

It was agreed that the notice had reference in all cases to the letting; and that a month's notice was sufficient to entitle the plaintiff to recover.

Marryatt for the Plaintiff.

Lawes for the Defendant.

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LAST SITTING IN TERM, AT WESTMINSTER.

The KING v. BLACKMAN.

Wednesday, Feb. 19th.

A peace-officer who in searching for other goods discovers naval stores, and information is filed in pursuance of such discovery from him, is to be deemed the informer.

THIS was an information against the defendant, under stat. 17 *Geo.* II. *c.* 40. *s.* 10, for having naval stores in his possession, contrary to stat. 9 and 10 *Wm.* III. *c.* 41.

The first witness called for the crown, was a police-officer. He stated that an information having been given at the office to which he belonged, that the defendant had in his possession a quantity of iron, copper, and brass, that he went with a warrant to search for it; and that in making his search, he had discovered the naval stores in question. He was asked on his *voire dire* by *Erskine*, for the defendant, if any officer or other person had given information to the Admiralty respecting these stores. He answered in the negative; upon which *Erskine* objected to his competence.

He stated, that the statute 17 *Geo.* II. having given a moiety of the penalty of 200*l.* which that statute inflicts on persons having

having naval stores in their possession, to the informer, that as no previous information had been given to the Admiralty, that the witness must be deemed to be the informer, and therefore interested.

1794.

The King v. Blackman.

[96]

It was answered, that the same statute also left it in the discretion of the Judge who tried the offender, to inflict a corporal punishment in lieu of such fine of 200*l.* and which punishment the court had in a recent instance inflicted. That as therefore before sentence it could not appear whether the sentence would be by fine or by corporal punishment, and it might be by the latter, that that should rebut the supposition of interest.

Though stat. 17 *Geo.* II. c. 40. leaves an option in the judge either to inflict corporal punishment or impose a fine, the expectation of a share of the fine shall render a witness incompetent.

The witness was then asked if he did not expect part of the fine, in case the defendant should be convicted; he said, that he did. Being asked if he would release, he refused it.

Lord Kenyon said, that he was of opinion that the witness was incompetent. That though there certainly was an option in the Judge either to fine or to inflict corporal punishment, that the former mode had generally been adopted: and though in the case alluded to, the court had inflicted a corporal punishment, that had been in consequence of declarations by the person convicted that he did not mind the fine, as he could easily pay it. That therefore, on the footing of interest, he thought a witness in a case of this description inadmissible; but that the declarations of the witness in this case sufficiently shewed the bias of his mind, that the prospect of a share of the fine would influence his testimony. He therefore rejected him.*

Mingay and *Brodrick* for the Crown.
Erskine for the Defendant.

* Vide *Rex* v, *Cole*, post, 169.

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[97]

Powell and Another *v.* Blackett.

Thursday, Feb. 20th.

If the obligor of a bond acknowledges to the subscribing witness that he executed it, it is sufficient.

DEBT on a bond.—Plea of *non est factum.*—To prove the execution, the subscribing witness was called, who was the defendant's shopman. Being asked if he had seen the defendant seal and deliver the bond in question, he said not: That the defendant brought the bond to him ready signed and sealed; told the witness that he had executed it, and desired him

1794. — Powell and Another v. Blackett.

him to subscribe his name as a witness to the execution; which he accordingly did.

Lord Kenyon ruled it to be sufficient proof of the execution.

Erskine and —— for the Plaintiff.

Mingay for the Defendant.

The King *v.* Eden.

Friday, Feb. 21.

On an indictment for perjury in what the defendant as a witness swore on a trial, the party against whom the verdict went in consequence of such testimony is inadmissible, until he has paid the debt and costs in that action.

THIS was an indictment for perjury.—The perjury assigned was, that in a certain action wherein one *Earle* was the plaintiff, and *Brett* the defendant, which was an action brought to recover the price of certain wines, supposed to have been sold by *Earle* to *Brett*, it became material to decide whether the wines had *been sold on account of *Earle* the plaintiff, or of *Eden*, the defendant, in this indictment; and it then stated, that at the trial of that cause, *Eden* had sworn, "I sold them for Mr. *Earle*, never for myself:" in consequence of which, a verdict in that case went in favour of *Earle*.

[*98]

On the part of the prosecution, *Brett* was called as a witness. Before he was examined, *Erskine* for the defendant, asked him, if he had paid the debt and costs in the action at the suit of *Earle*. He said he had not, but that the bail had been fixed; upon which *Erskine* objected to him as incompetent.

The counsel for the prosecution insisted, that there being a judgment subsisting against him, and beside that the bail being fixed, that he was at all events liable, and so that the event of this prosecution could not avail him in any respect as against the judgment.

Lord Kenyon said, that it appeared to him, that in case the defendant was convicted on this prosecution, that *Brett* would be relieved in a court of equity against the judgment, the verdict having been obtained on the sole evidence of *Eden*: That therefore the conviction of *Eden* being the means of relieving him from the judgment, was an interest which rendered him incompetent; and he rejected him accordingly.

Variance between the judgment-roll and the *Nisi Prius*-roll fatal, where the former is to be given in evidence.

After the case had been nearly gone through, *Erskine* took an objection to the indictment for a variance. It was, that in the *Nisi Prius*-roll, the indictment set out that "the cause [of *Earle* v. *Brett*] came on to be tried before Lloyd Lord Kenyon, Chief Justice of our said Lord the King, *William Jones* being

being associated, &c.;" whereas, in the judgment-roll of that cause, it was, that "*Roger Kenyon*" was associated, &c. &c. His Lordship ruled this to be a fatal variance, and directed an acquittal.*

1794.

The King v. Eden.

[*99]

Mingay and *Wigley* for the Prosecution.

Erskine for the Defendant.

Hopkins v. Nightingale, et. alt.

Saturday, Feb. 22.

What shall be deemed an outer-door; which it is not lawful to break for the purpose of an arrest.

TRESPASS *vi et armis* for breaking and entering the plaintiff's house.

The defendants pleaded, 1st, The general issue. 2dly, A justification; which was, that having a writ to take the body of the plaintiff, that they entered for the purpose of making the arrest.

The plaintiff replied, *De inj. suâ propriâ*, &c. that the defendants in making the arrest had broken the *outer-door* of his house.

The circumstances of the case were, that the plaintiff's house stood in a stable-yard which was surrounded by a wall; there was a hatch-gate at the foot of the stairs which led to an open gallery, from whence there were doors to the several apartments: at the top of the stairs was a door across that part of the gallery which led to the chamber where the plaintiff was: the under part of the house was in stables. The defendants having got admission into the yard, went up stairs and broke open the door at the top of the stairs, and arrested the plaintiff. The question was, Whether this was the outer door of the plaintiff's house or dwelling? [100]

Lord Kenyon was of opinion that it was; and directed a verdict for the plaintiff.

Mingay and *Maryatt* for the plaintiff.

Garrow for the Defendant.

IN THE COMMON PLEAS.

SITTINGS AFTER TERM, AT GUILDHALL.

Saturday, Feb. 22.

STANSFIELD *v.* JOHNSON.

In cases of the sale of lands, the auctioneer is not to be considered as the agent for both parties, and therefore his entering the name of the buyer of a lot of land in his book as the purchaser, is not a note in writing within the statute of Frauds.

THIS was a special action on the case.

The action was brought for not completing a purchase of copyhold lands which had been put up for sale by auction; the defendant was the best bidder; the lot was knocked down to him; and being asked his name, he said *Johnson;* and his name was written in the catalogue against the lot, as the purchaser. The deposit not being then paid, was soon after demanded; but the defendant refused either to pay it or to complete his purchase; for which default the action was brought.

For the defendant it was insisted, that this was a case within the statute of Frauds, 29 *Car.* II. *c.* 3. § 4, which enacts, "That no action shall be brought to charge any person on any contract for the sale of lands, or any interest in them, unless the agreement shall be in writing, signed by the party or his agent."

The counsel for the plaintiff cited the case of *Simon* v. *Motivos,* 3 *Burr.* 1921, and insisted that the auctioneer was, under [102] the authority of that case, to be deemed the agent of both parties; and his signing the name of the defendant against the lot, a note in writing within the statute.

Eyre, Ch. J. was of opinion, that the case of *Simon* v. *Motivos,* applied to the sales of goods only, which was a distinct clause of the statute of Frauds, and that the present case was expressly within it; and the plaintiff therefore could not recover.

It was then contended, that the plaintiff had a right to recover on the money-counts, for the money paid for the duty.

The Chief Justice thought not; but allowed a verdict to be taken for the Plaintiff, saving the point.

1794.

YOUNG v. BAIRNER.

IN THE KING'S BENCH.

SITTINGS AT GUILDHALL, AFTER TERM.

YOUNG v. BAIRNER.

Wednesday, Feb. 26th.

Where there there are several partners, and an action is brought against one of them, another partner is an inadmissible witness to prove he himself to be liable, as he is interested in the event of the suit; but a release will make him competent.

ASSUMPSIT for work and labour, &c. in painting a ship, of which the defendant was the owner. He pleaded in abatement that he was the joint owner of the ship, together with others named in the plea, who ought to have been sued. Replication, that he had undertaken *solely* to pay, &c. upon which issue was joined.

The plaintiff proved the work done, and that it had been done by the defendant's order; and that being applied to for payment before the action brought, that he had said that he would call on the plaintiff and pay him.

Mingay, for the defendant, stated his defence to be, that the work had been ordered by one *Whytock* the master of the ship, who was also a part owner; and he proposed to call *Whytock* to prove it, insisting that he was a good witness, as he was by his evidence to charge himself; inasmuch, as being master, he was liable to be sued alone on his contract, for goods ordered on account of the ship.

[104]

But Lord KENYON ruled, that his testimony was inadmissible; for being a part owner, he was liable for his share of the debt for which the action was brought; and the object of his testimony in this case was, to defeat an action brought to recover a demand, to which, if recovered, he was bound to contribute.

The defendant offered to release the witness.

Lord KENYON was of opinion, that that would not make him competent: and the Defendant had a verdict.

Erskine and *Marryatt* for the Plaintiff.

Mingay and *Wigley* for the Defendant.

In the next term *Mingay* moved for a new trial, on the ground that the release would have made the witness competent: for that as in case the verdict went for the plaintiff, the defendant in this action would be solely liable to the plaintiff, though he would have a right to call on the other part-owners for contribution; and he was willing to release *Whytock* from his

1794. YOUNG v. BAIRNER.

his part of the contribution by a release, that *Whytock* would thereby be made a competent witness.

Lord KENYON, on the rule coming on, said, that it appeared so then to him; and the rule for a new trial was made absolute.

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[105]

Same day.

RUCKER *v.* CAMMEYER.

A broker who is employed to sell goods for any person, and who agrees for the sale of them, and gives to the purchaser, and to his employer a sale-note, is to be considered as agent for both parties; and such note is a sufficient note in writing within the statute of Frauds.

ASSUMPSIT to recover the price of ten hogsheads of sugar sold by the plaintiff to the defendant.

The case as proved on the part of the plaintiff was, that having a quantity of sugars to sell, that samples were sent (as is usual) to the plaintiff's broker. The broker was called, and proved that the samples were sent to him, and exposed, together with other samples of different sugars: that the defendant examined the samples, and fixed on those for which the action was brought: that he asked the broker from whence the sugars had come; and was answered, "that they came from the north—from *Scotland.*" He asked the price; and was told 63*s.* *per* cwt. The broker said further, that he afterwards brought the plaintiff and defendant together, when he supposed the bargain was concluded, as he soon after received orders from the plaintiff to make out sale-notes of ten hogsheads to the defendant, at 63*s.* *per* cwt. These sale-notes, he said, contained the price and quantity of the sugar sold, and that one of them was usually given to the buyer and the other to the seller. The plaintiff, he said, had his note from him, and the defendant had sent for his, which was delivered to him, and soon after part of the sugar, which he sent back, saying, that he had contracted for new sugars, but that these were old. He said that, at the time of the sale, the defendant made no inquiry whether the sugars were new or old.

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Erskine for the defendant objected: that this contract was within the statute of frauds, he said: that the broker being the agent of *Rucker*, the plaintiff only, and there being no note in writing on the part of the defendant, either by himself or any agent authorised by him, nor proof of any direct and immediate contract of sale with him, that it therefore was void under the statute, for want of a note in writing.

Lord KENYON said, that it was of great importance not to break in on any decision which had taken place on the statute of Frauds; and cited the case of *Simon* v. *Motivos*, 3 *Burr.*

1921,

1921, as ruling the present case. He said that the broker must be considered as the agent of both parties, and need not be constituted by writing; but that in this case he had in fact given the defendant a note in writing when he gave him the sale-note, which he had accepted.

1794.

RUCKER v. CAMMEYER.

Bower and *Shepherd* for the Plaintiff.

Erskine and *Holroyd* for the Defendant.

BOLTON v. REICHARD.

Saturday, March 1.

Where a person in payment of goods gives an order to pay the bearer the amount in good bills on *London*, and the party takes bills to the amount, he does it at his own risk.

ASSUMPSIT for goods sold and delivered. The parties lived at *Liverpool*; and the case stated and proved on the part of the plaintiff was, that the defendant having bought a quantity of *mahogany from the plaintiff, he gave him a draft on *Caldwell* and Co. for the amount; the draft was an order on *Caldwell* and Co. to give to the plaintiff a good bill on *London* at 70 days, to the amount of the value of the goods. *Caldwell* gave the plaintiff his bill on *Burton, Forbes,* and *Gregory*, which the defendant accepted: before the bills became due, *Burton, Forbes,* and *Gregory* became bankrupts.

The plaintiff contended, that these bills having been bad, could not be deemed as payment for the goods, and that the defendant was still liable to the amount. [*107]

For the defendant it was insisted, that the plaintiff had accepted the bills in question at his own risk, and that he therefore could not now resort to the demand for the goods sold.

Lord KENYON said, that under the order given by the defendant to *Caldwell*, that it became incumbent on the plaintiff to take care that he got good bills; the order saying, "Give to *Bolton* bills on *London* at 70 days," meant *good bills*: that he therefore took them at his peril; and their having eventually turned out bad, should not give him a right to waive all the intermediate transaction, and have recourse to the demand for the goods sold. He therefore directed the jury to find for the Defendant: which they did.

Erskine and *Baldwin* for the Plaintiff.

Bearcroft and *Bower* for the Defendant.

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Stewart et. alt. (Assignees of ——, Bankrupt) v. Richman.

Saturday, March 1.

Stewart et. alt. (Assignees of ———, Bankrupt) v. Richman.

A concerted act of bankruptcy cannot support a commission.

TROVER for a quantity of malt, by the plaintiffs as assignees.

Lord Kenyon said that it was not now to be questioned, whether if a trader by concert with his creditors, commits an act of bankruptcy, that such can be good to support a commission; that whatever idea of policy or propriety first suggested it, and though it might appear that a commission of bankruptcy is the most equitable mode of dividing the bankrupt estate among his creditors, that it was now settled, that a trader could not legally concert an act of bankruptcy with his creditors.

A creditor having proved a debt under a commission of bankrupt, shall not prevent him from impeaching the commission in an action brought against himself.

His Lordship further ruled, that if a creditor of a bankrupt obtains money or goods from the bankrupt before his commission sued out, in part discharge of his debt, and proves the remainder under his commission, that if an action is brought by the assignees to recover back the money or goods so obtained, that the creditor having so proved his debt under the commission, shall not prevent him from disputing the validity of the commission in defending the action.

Erskine and *Marryatt* for the Plaintiff.

Mingay for the Defendant.

[109]

Monday, March 3.

Naylor v. Mangles et alt.

A wharfinger has a lien on goods brought to his wharf for the balance of a general account.

ASSUMPSIT for money had and received.

The plaintiff had purchased from one *Boyne* twenty-five hogsheads of sugar then lying in the defendant's warehouses, who was a wharfinger. *Boyne* was in debt to the defendant to the amount of 167*l.* part of which only was for the charges of these twenty-five hogsheads of sugar; the remainder was for the balance of a general account, for which the defendant claimed a lien, and refused to deliver them to the plaintiff till the whole sum was paid. The plaintiff paid him the whole money, and then brought this action to recover it back.

The whole question turned upon the point, Whether a wharfinger had a lien for the balance of a general account upon the goods in his possession?

The

1794.

NAYLOR v. MANGLES et. alt.

The counsel for the defendant said, that it had been decided in three different cases that they had, and called witnesses to prove it; with which the jury seemed completely satisfied.

Lord KENYON said, liens were either by common law, usage, or agreement. Liens by common law were given where a party was obliged by law to receive goods, &c. in which case, as the law imposed the burthen, it also gave him the power of retaining for his indemnity. This was the case of inn-keepers who had by law such a lien. That a lien from usage was [110] matter of evidence. The usage in the present case had been proved so often, he said it should be considered as a settled point, that wharfingers had the lien contended for.*

Bearcroft, *Shepherd*, and *Park*, for the Plaintiff.

Erskine for the Defendant.

* Vide Spears v. Hartley, post, 3 vol. 81.

DIXON v. PARKES *et alt.*

Same day.

Where the obligee of a bond receives the whole principal after it is payable, he cannot recover interest in an action on the bond, as *solvit post diem* is a good plea.

THIS was an action of debt on a *respondentia* bond, given in the *East Indies*. Pleas of *Non est factum, et solvit post diem*.

The bond was payable 21 days after the ship's arrival at *Canton*; but if not then paid, there was reserved an increase of interest. The ship arrived at *Canton*; but the bond was not paid for three months after the 21 days, when the defendant paid the principal and interest up to the 21 days, but would not pay the increased or any interest for the 3 months; to recover which was the object of the present action.

Lord KENYON ruled, that the plaintiff could not, in the present form of action, recover the interest, having received the principal. He said, that this was a plea under the stat. 4 *et* 5 *Ann. c.* 16, which allows a payment to be made after the day, [111] and that it may be pleaded in bar: that the jury give the interest in the form of damages, but there must be something to support them; that here the principal having been paid, for *it* there could be no verdict: that that being gone, every thing founded on it must go too, therefore no damages could be given in the present case, the claim for which alone was the foundation of the present action. If the plaintiff meant to have demanded further damages, he ought not to have received the

 principal;

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DIXON v. PARKES, et. alt.

principal; as a tender after the day without payment was not pleadable in bar under the statute; in which case he could, in the present action, have recovered the whole principal and increased interest.

The Plaintiff was nonsuited.

Erskine and *Barrow* for the Plaintiff.

Mingay and *Morgan* for the Defendant.

[112]
Tuesday, March 4.

EAST INDIA COMPANY v. HENSLEY.

Where a man appoints a general agent, he is bound by all his acts: *aliter* where he appoints an agent for a particular purpose only; there the principal is only bound to the extent of the authority given.

THIS was an action on the case, to recover damages for the loss arising from the re-sale of a certain quantity of raw silk sold by the Company at one of their sales to the defendant.

The silk had been bought by one *Briggs*, a broker, for the defendant; and the defence set up by the defendant was, that his orders were to *Briggs* to buy the best *Bengal* raw silk; whereas this was not raw silk, nor of the best quality.

Lord KENYON took the distinction between a general and special agent; that in the first case the principal must be bound by all his acts, whereas in the latter he is only bound while the agent acts within the scope of his authority; and that if in the present case the defendant could prove that he had so specially authorized *Briggs* to bid for him for best *Bengal* silk, and this turned out to be not of that description, that he should not be bound by his contract so made without his authority; but that *Briggs* should be liable to an action at the suit of the Company for his abuse of it.

Bearcroft, Rous, and *Wood* for the Plaintiff.

Erskine and *Shepherd* for the Defendant.

[113]
Same day.

MERTENS v. WINNINGTON.

Where a person takes up a bill of exchange for the honour of any one whose name is on the bill, he becomes as in-

ASSUMPSIT against the Defendant as drawer of a bill of exchange.

The bill in question was drawn by the defendant on *Carrioni* in *Italy*, in favour of *Webbould*: *Webbould* indorsed it to *Burton, Forbes,* and *Gregory;* they sent it to their correspondent in *Holland*, who sent it to *Italy*, where it was presented to *Carrioni* for

for payment, who refused it; upon which the plaintiffs, who were merchants resident at *Venice*, paid the bill for the honour of *Burton, Forbes*, and *Gregory*, and now brought their action against the defendant as drawer.

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MERTENS v. WINNINGTON.

The counsel for the defendant contended, that where a bill is taken up for the honour of any of the parties whose names are on it, that such person only shall be liable.

dorsee of the bill, and intitled to all remedies against those whose names are on it.

But Lord KENYON was of opinion, that where a bill is so taken up, that the party who does so, is to be considered as an indorsee paying full value for the bill, and as such entitled to all the remedies to which an indorsee would be entitled, that is, to sue all the parties to the bill; and he therefore directed the jury to find a verdict for the Plaintiff.

Bearcroft and *Baldwin* for the Plaintiff.

Erskine and *Lawes* for the Defendant.

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SMITH and Others *v.* JAMESONS.

Friday, March 8.

Where there are more assignees than one of a bankrupt estate, one of them may receive money belonging to the bankrupt estate, and give a good discharge for it.

THIS was a case directed by the Lord Chancellor for the opinion of the Court of *King's Bench;* the principal point of which being reserved for argument, is not here inserted.

It was an action for money had and received.

The defendants had been partners in trade: while they were in partnership one of them being assignee to a bankrupt estate, had used part of the money belonging to that estate in the partnership-trade, without the knowledge or acquiescence of the other assignees, who were the Plaintiffs in the present action, but with the knowledge of his partner that the money was part of the bankrupt estate.

In *December*, 1792, the partnership was dissolved, and the partner who was the assignee continued in the business, and received from the other, money and effects sufficient to discharge all debts due by the partnership, including the money of the bankrupt estate, of which they had had the use.

It then became a question, Whether this was a re-payment to the partner who was assignee, and so should discharge the other?

Lord KENYON was of opinion, that one assignee of a bank-

[4]

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SMITH and others v. JAMESONS.

rupt estate might receive the monies belonging to the estate, and gave a legal and valid discharge to it.

Erskine, *Bower* and *Russel* for the Plaintiffs.

Bearcroft Law, and *'Epinasse* for the Defendant.

COORE v. CALLAWAY.

Same day.

Where the issue is on a subsequent demand and refusal to a plea of tender, the demand must be by a person who had authority to receive it.

ASSUMPSIT for goods sold and delivered. There was a plea of a tender, and replication of a subsequent demand and refusal; which was the issue in the case.

To prove the subsequent demand and refusal, the clerk to the attorney in the cause was called. He was asked by what authority he had gone to make a demand of the money; he said, he had been sent by his master for the purpose, and had so represented himself to the defendant when he demanded the money.

The clerk to the attorney in the cause is not a person of that description.

Lord KENYON said, that on an issue of this sort turning on the demand, that it should appear that the person who made the demand was properly authorized to receive the money; that though payment to the attorney while an action was subsisting was good, that it was otherwise to his clerk who shewed no authority but his master's orders to demand it. His Lordship said, he recollected a case where a person having refused to take a conveyance executed by one having a power of attorney for the purpose, it was held to be lawful for him to refuse [116] a conveyance so executed, as it multiplied his proofs. He thought, therefore, that, in the present case, the defendant was not bound to pay the money to a person coming under the circumstances of the witness, as his representing himself as clerk to the attorney; and that he had been sent by him for the purpose of demanding it, was not a sufficient authority to receive, and therefore warranted the defendant in refusing to pay the money; and that the evidence therefore did not maintain the issue.

The demand of the sum ought to be of the sum for which the action is brought.

In the course of the examination of this witness, he was asked, what sum he had demanded from the defendant; he said, the debt, and half the costs of a former action which had been commenced against the defendant by a wrong name, but which had been discontinued.

It was contended, that this demand was irregular and inconsistent

sistent with the issue, it not being of the specific debt, but of another sum which the defendant was not bound by law to pay. It was answered, that he had agreed to pay one half of the costs of that action which had been discontinued.

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COORE v. CALLAWAY.

Lord KENYON said, it was *nudum pactum*, and the demand therefore not a proper one. He therefore nonsuited the plaintiff on both grounds.*

Erskine and *Lambe* for the Plaintiff.

Garrow for the Defendant.

* Vide *Solomons* v. *Dawes*, ante, 83.

IN THE COMMON PLEAS.

[117]

SITTINGS AT GUILDHALL, AFTER MICHAELMAS TERM, 33 GEO. III. 1792.

PUGET DE BRAS v. FORBES and GREGORY.

[1792.]

Where, by the custom of trade, bills are given before the money is received, if the payee's agent who was to pay the money, becomes insolvent before the money is received, the drawer is not liable on the bill.

ASSUMPSIT by the plaintiff, as payee of a bill of exchange, against the defendants as drawers.

The plaintiff in this case was a foreigner, residing in *Holland*; and having a large sum of money here in the funds, employed the house of *Agassiz Rougemont* and Co. as his agents to sell it out, and to remit it to him in bills on *Holland*.

Agassiz Rougemont and Co. applied to the defendants for the purpose, and on the 17th of *February* 1792, got from them bills on *Holland* in favour of the plaintiff. It was proved to be the custom of *London* for persons in the habit of remitting foreign bills, to give the bills on one day, but not to receive the money for them till the next post-day. In this case the next post-day was *Tuesday*, *February* the 21st. On *Monday* the 20th, the house of *Agassiz Rougemont* and Co. stopped payment; so that the defendants in fact had never received any value for the bills which [118] they had so drawn on *Holland* in favour of the plaintiff; and they having ordered their correspondent abroad not to pay the bills when due, this action was brought againt them as drawers of the bills.

The

1792.

PUGET DE BRAS v. FORBES and GREGORY.

The plaintiff's case rested merely on the law merchant knowing no *nudum pactum*, and that it was proper that the defendants should have received the money before they granted the bills; and that in consequence of their not having then received it, and *Agassiz Rougemont* and Co. having failed, that he had lost the money of his they had sold out of the funds.

The defendant relied on the custom of merchants in the remitting of the bills, and that they had been guilty of no laches. That the custom of giving bills on *Holland* before the receipt of the money for them was perfectly well known and established; and that they therefore should be allowed to go into that defence against the plaintiff, who was the payee of the bills.

Lord LOUGHBOROUGH was of opinion that it was competent for the defendants to go into this evidence as against the payee of the bills, he being subject to all the equity the defendants could have had against his agents *Agassiz Rougemont* and Co. if the bills had been drawn payable to themselves, who must
[119] be supposed to have been acquainted with the usage on bills, though his Lordship said that such evidence would be inadmissible had the action been brought by an indorsee for a valuable consideration.

The Defendants had a verdict.

Adair, Serj. for the Plaintiff.

Law, for the Defendants.

IN THE COMMON PLEAS.

SITTINGS AFTER HILARY TERM, 33 GEO. III. 1793.

[1793.]

LAMBERT *v.* ROBINSON.

When goods are taken by the owner from the waggon, the carrier or warehouseman has no claim for

THIS was an action of trover for a parcel of goods which came by the *Tunbridge* waggon to the defendant's inn, where the waggon put up.

The case was, that the goods in question had been taken up on the road; and when the waggon arrived at the inn, the plaintiff, who was owner, was there ready to receive them.

The

1793.

LAMBERT. v. ROBINSON.

booking or warehouse room; there is in such case no lien by law.

The carriage came to 3s. 6d. which the plaintiff then tendered, The defendant refused to deliver them till paid a further sum of two-pence *per* parcel for booking. This the plaintiff refused to pay, as the goods had not been booked, having been only taken from the waggon to the scales, where they were weighed, in order to ascertain the sum to be paid for the carriage, and there received by the owner. It was then demanded as warehouse-room, and refused *on the same principle, as the goods had never been brought into the house, but delivered from the waggon. The defendant persisted in holding them until the two-pence was paid; upon which the present action was brought to recover them. [*120]

It was held by EYRE, Chief Justice, that the defendant had set up no colour of title to warrant him in holding the goods, as there was no lien given by law in this case. But that even admitting that by law he had a lien, it must be for some legal demand. That in the present case the demand was an exaction, as the defendant could not claim a sum where there was no duty performed; in this case, there having been no entry in the books, nor warehouse-room occupied. He therefore directed a verdict for the plaintiff.

Adair, Serjeant, for the Plaintiff.
Bond, Serjeant, for the Defendant.

CROFT v. SMALLWOOD. [121]

Same Sitting.

What promise is not within the statute of frauds.

THE declaration in this case stated, That the plaintiff, who carried on the business of a tailor, being applied to by one *George Foster* to be supplied with certain clothes and wearing-apparel, before that time made by the plaintiff, but which were still in possession, was unwilling to deliver them to the said *Foster* upon the credit of the said *Foster*, and refused so to do; but that in consideration that the plaintiff, at the special instance and request of the defendant, would deliver the said clothes to the said *G. Foster*, the defendant undertook and promised to pay, and then averred the delivery to *Foster*.

The witnesses called on the part of the plaintiff, proved, that

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that the clothes had first been sent home to *Foster*, by the plaintiff's foreman, he being then out of town; that *Foster* not having paid for them as he promised, the foreman prevailed on him to let him have the clothes again; and that soon after, the defendant came to the plaintiff's shop, and said, that if he would send the clothes again to *Foster*, that he would pay. It was also proved, that the defendant being some time after applied to for payment, said it was not then convenient to him; but that he had a bill would soon be due, when he would pay.

The counsel for the defendant objected: that this case was clearly within the statute of frauds: that the principle, as established by the case of *Matson* v. *Wharam*, 2 Term Rep. 80,
[122] was, that wherever the party who receives the goods is himself in anywise liable, that there, in order to charge a third person on his undertaking, that a note in writing is necessary. That there could be no doubt that in this case *Foster* was liable, and the original credit given to him.

EYRE, Ch. J. was of opinion, that the case was not within the statute of frauds: that the whole credit was given to the defendant, and that he was liable.

Marshall, Serjeant, and *Lawes* for the Plaintiff.

Adair, Serjeant, and *'Espinasse* for the Defendant.

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IN THE KING'S BENCH.

SITTINGS AT WESTMINSTER, AFTER EASTER TERM, 28 GEO. III. 1788.

[1788.]

MOLTON *v.* CHEESELEY.

In an action of debt to recover the penalties under the game laws, the plaintiff can recover but one

THIS was an action of debt* brought to recover from the defendant two penalties of 5*l.* each, under the statute

* By stat. 8 *Geo.* I. 19. "Where any person shall be liable to any penalty under the Game Laws, by conviction before a justice of peace, it shall be lawful for any person either to proceed to recover the said penalty by information before a justice, or *to sue for the same by action of debt.*"

The

5 *Ann.* 14. The first was for having a pheasant in his possession, he not being a person qualified by the laws of the realm to kill game. The second was under another clause of the same statute, for keeping a dog for killing and destroying the game, which inflicts a penalty of 5*l.* on the offender.

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MOLTON v. CHEESELEY.

penalty under the statute for the same act.

When the case was opened, Mr. Justice BULLER ruled, that the plaintiff could go for one penalty only; for that both offences being by the same act, the plaintiff could recover but one penalty under the same statute.

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The case then proved on the part of the plaintiff was, that a pheasant had been killed by accident by the defendant's dog, but that he had carried it away.

If a person not qualified to kill game, kills a pheasant or other game by accident, he cannot take it away, or he is subject to the penalty.

BULLER, Justice, said, that if it appeared that the bird was killed by accident, that that was no offence, but that in such case it should be left where it was killed; for if it was taken away, it subjects the party to the penalty, for having game in his possession.

The plaintiff therefore recovered one penalty of 5*l.* for this offence.

IN THE KING'S BENCH. [125]

SITTINGS AT GUILDHALL, AFTER TRINITY TERM, 30 GEO. III. 1790.

REX *v.* DOYLE. [1790.]

THIS was an indictment against the defendant for perjury. When the cause was called on, the defendant's counsel moved to put off the trial till the following term, on an affidavit of the absence of two material witnesses. The motion was not opposed by the counsel for the prosecution, but they insisted that they were intitled to the costs of the day. The counsel for the defendant contended, that the rule of giving the costs of the day in the case of an application of this nature, was confined to civil cases only, not to criminal ones.

If the trial of an indictment for perjury is put off on the application of the defendant, he must pay the costs of the day.

But Lord KENYON ruled, that the prosecutor was intitled to his

1790.

Rex v. Dohil.

his costs; and cited a case of the *King* v. *Vaughan*, where the question had so been decided.

[*126]

In such case the prosecutor is not entitled to any costs on his own account, unless his name appears on the back of the bill.

*In the *Michaelmas* term following, when the master came to tax the costs, the prosecutor claimed a large sum for his costs, loss of time and other charges, he being an attorney. The Master refused to allow him any, his name not appearing upon the back of the bill. Upon which he obtained a rule to shew cause why the Master should not review his taxation, and make him the allowances claimed.

The counsel for the defendant insisted, that the only claim the defendant could have, must be, that he was a witness in the cause: that the order of *Nisi Prius* giving the prosecutor the costs of the day, included only the charges of the witnesses' and counsel's fees: that his name did not appear on the bill; and that he therefore could not be deemed a witness, nor be entitled to his costs.

On the other side it was contended, that this case should be governed by the rule which would be adopted in taxing costs, under stat. 5 and 6 *W.* and *M.* where, if the defendant is found guilty, the prosecutor is intitled to his costs as the party grieved; and cited *Rex* v. *Goter*, 2 Term Rep. and *Rex* v. *Smith*, 1 *Burr.*

But the Court held, that these cases only applied where the indictment was under the statute, and that the prosecutor was not intitled to his costs; and so discharged the rule.

Bearcroft, Bower, and *'Espinasse* for the prosecution.

Erskine and *Garrow* for the Defendant.

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IN THE KING'S BENCH.

SITTINGS AT WESTMINSTER, AFTER EASTER TERM, 31 GEO. III. 1791.

[1791.]

Rex *v.* Doran.

To prove an insurance from fire at a public office, the policy must be produced.

THE defendant was indicted for setting her house on fire.

To prove that the house was insured, the books of the Fire-Insurance Office were produced, in which was an entry to that effect.

The

1791.

REX. v. DORAN.

The defendant's counsel objected to this evidence, as there had been no notice given to produce the policy.

Lord KENYON ruled, that as the policy was the best evidence, the prosecutors could not give any evidence from their books, it being inferior evidence, unless notice had been given to produce the policy; accordingly rejected it.

END OF PART I. VOL. I.

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CASES

ARGUED AND RULED

AT

NISI PRIUS,

IN THE

KING'S BENCH;

IN

EASTER TERM 34 GEORGE III. 1794.

THIRD SITTINGS IN TERM AT GUILDHALL

RUFF *against* WEBB.

Saturday, May 24th.

A draft in these words, "Mr. *N.* will much oblige Mr. *W.* by paying to *J.R.* or order 20*l.* on his account," is a bill of exchange, and cannot be given in evidence without a stamp. Neither is such draft, though taken without objection by the party at the time, any discharge of a subsisting debt.

ASSUMPSIT for work and labour, with the common counts.

Plea of the general issue.

The action was brought to recover the amount of wages due by the defendant to the plaintiff.

The plaintiff had been servant to the defendant, and on his discharging him from his service, had given him a draft for the amount of his wages on an unstamped slip of paper, in the following words:—

> "Mr. *Nelson* will much oblige Mr. *Webb*, by paying to
> "*J. Ruff*, or order, twenty guineas on his account."

This draft the plaintiff had taken, but it did not appear that he had ever demanded payment of it from Mr. *Nelson*, to whom it was addressed.

It was given in evidence on the part of the defendant, that he lived in the country, and kept cash with Mr. *Nelson* in *London*, and that he paid all his bills in that manner, by drafts on *Nelson*: that the plaintiff knew that circumstance, and took the draft without any objection; and that if he had applied to

Nelson,

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RUFF *against* WEBB.

Nelson, that it would have been paid. This evidence was relied on as a discharge, and bar to the action.

[*130] * *Shepherd* for the plaintiff contended, that the only mode by which this could operate as a bar to the action, was by taking the draft in question as a bill of exchange; in which case, under stat. 3 and 4 *Ann. c.* 9. 7., it is declared, that if any person shall accept a bill of exchange, in satisfaction of a debt, that the same shall be deemed a full and sufficient discharge, if the person so accepting such bill for his debt, shall not take his due course, by endeavouring to get the same accepted and paid, and making his protest for non-acceptance or non-payment; but he contended, that in point of substance it was not a bill of exchange, but a mere request to pay money, not accepted by *Nelson*, or such as could put the plaintiff into any better situation with respect to his demand. But if it was taken as a bill of exchange, that it could not be given in evidence at all, as it was not stamped.

[131] It was answered by the defendant's counsel, that the plaintiff's, having accepted the draft as payment, was a waiver of every objection to it, and that he was therefore bound by it, and could not recur to the demand for wages.

Lord KENYON said, he was of opinion, that the paper offered in evidence was a bill of exchange; that it was an order by one person to another to pay money to the plaintiff or his order, which was in point of form a bill of exchange; that as such it could not be given in evidence, without being legally stamped; and as the only mode in which it could operate as a discharge of the plaintiff's demand was, as stated by the plaintiff's counsel, that the plaintiff in point of law was therefore entitled to recover.

Shepherd for the plaintiff.

Erskine and *Baldwin* for the defendant.

FIRST SITTINGS AFTER TERM AT GUILDHALL.

Wednesday, June 4th.

[132]

HOLMER *against* VINER.

Where a party has several demands on different accounts against a person who becomes insolvent; and he consents to execute a deed of composition, he shall not be allowed to split his demand, and by proving only part under the deed of composition, to sue for the remainder at a subsequent time.

THIS was an action brought to recover the amount of two bills of exchange: the first was dated the 15th of *March* 1791, and drawn by one *William Hunt* on the defendant, in

favour

favour of the plaintiff, for 229*l.* twelve months after date; the second was between the same parties, and dated the 22d of *March* 1791, for 122*l.*

The circumstances of the case as given in evidence were, that *Hunt*, the drawer of the bills, being in *March* 1791 indebted to the plaintiff, and unable to pay him, the plaintiff insisted on his procuring some security; that *Hunt* in consequence prevailed upon the defendant to become such security, by accepting the two bills in question, but at the same time informed the plaintiff, that the defendant owed him nothing, but had accepted the bills merely to accommodate him.

Between the month of *March*, when the bills were given, and the month of *June* following, the defendant became indebted to *Hunt* in 185*l.* and to the plaintiff in 81*l.* for goods sold.

In the same month of *June*, the defendant's affairs became embarrassed, and *Hunt* was about to make him a bankrupt; but the plaintiff prevailed on him not to do so, but to make the defendant execute an assignment of all his effects to trustees, for the benefit of his creditors at large. On the second of *July* a deed for that purpose was prepared and executed by the defendant. The plaintiff, together with *Hunt* and one *Roper*, were appointed trustees; and it was executed by the rest of the creditors.

The trustees, under the deed of assignment, possessed themselves of all the defendant's effects, for the benefit of the creditors.

At the time of executing the deed, the plaintiff was in possession of the two bills of exchange in question, accepted by the defendant; but he proved neither of them under the deed, [133] but signed only as a creditor for 81*l.* which was the amount of the debt due to him by the defendant for the goods sold.

In the month of *June* 1793, *Hunt* became a bankrupt, the plaintiff being still in possession of the bills: *Hunt* obtained his certificate, and then, for the first time, the plaintiff demanded payment of the bills from the defendant, and brought the present action.

Under these circumstances the counsel for the defendant contended, that the action could not be maintained. They insisted, that the plaintiff's conduct in not claiming the bills under the defendant's deed of assignment, was decisive evidence; that he considered them merely as accommodation-paper, and that

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Hunt only was his debtor, which was fortified, by the plaintiff's never having demanded payment from the defendant till after *Hunt*'s bankruptcy: but admitting that this did not amount to a discharge, they relied, that being a subsisting debt at the time of the assignment, and the deed containing a release of all demands then subsisting, that the bills must be held to be discharged by virtue of the deed.

By the plaintiff's counsel it was insisted, that the plaintiff had done no act whatever to discharge his demand against the defendant, who was the acceptor of the bills; they contended that the bills not being due at the time the deed of composition was executed, the defendant having failed three months after the [134] bills were given, so that they had nine months then to run, that the plaintiff could not have proved them under the deed; but that supposing that they could have been claimed under the deed, they contended that the plaintiff could only be barred as to such debts as he had claimed under the deed; that he had only claimed 81*l*. which was the amount of the debt for goods sold and delivered, but had not proved or claimed the bills under it; so as to these he could not be barred.

A person holding bills or securities not then due, may prove them under a deed of composition of an insolvent's estate; and if he does not, he shall be barred by executing the deed, though he makes no claim on account of such securities.

Lord KENYON said, that though the bills were not due at the time when the deed was signed, there was a subsisting debt then due to the plaintiff by the defendant, as the acceptor of these bills of exchange; and though they had some time to run, they might nevertheless have been claimed against the defendant's estate, in the same manner as bills of exchange are proveable under a commission of bankrupt, by stat. 7 *Geo.* 1. 31, by allowing a rebate of interest. That it was not to be allowed that a party, having several demands against an insolvent person, should split those demands, and come in under the composition-deed for part, and sue for the remainder at a subsequent time: that such would be a fraud upon the other creditors, and defeat the very object of the composition, which was intended by the creditors to discharge the insolvent from all his debts, as well as be an oppression of the debtor, who had given up all his property to constitute a fund for their benefit.

His Lordship therefore said, that he was clearly of opinion that, as the bills upon which the present action was brought had been in the plaintiff's possession when he executed the deed [135] of composition, that if he meant to have claimed them against the defendant, he should have made them part of his demand against

against his estate as assigned; and that not having done so, and having executed the deed, he was thereby completely barred as to any right of suing on the bills.

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HOLMER *against* VINER.

The jury found a verdict for the defendant.

Mingay and *Shepherd* for the plaintiff.

Erskine, *Garrow*, and *Morgan* for the defendant.

In the next term a new trial was moved for on the part of the plaintiff; but the Court of King's Bench agreed in opinion with the Lord Chief Justice, and refused the rule.

Vide *Stock* v. *Mawson*, 1 *Bos.* and *Pull.* 286. *Crockshott* v. *Bennett*, 2 T. R. 763. *Jackson* v. *Lomas*, 4 T. R. 166. *Feise* v. *Randal*, 6 T. R. 246. *Butler* v. *Rhodes*, post, 236.

GRAY et alt. *against* PALMERS and HODGSON.

Same day.

When the plaintiff on a joint and several promissory note, declares against the defendants jointly, and they sever in their pleas, and one of them by his plea admits his hand-writing to the note, and the other pleads *non assumpsit* at the trial, the plaintiff must prove the hands-writing of all.

ASSUMPSIT by the plaintiffs, as indorsees of a promissory note, against the defendants as the drawers.

The note was a joint and several one, and signed by *James* and *John Palmer*, and *Edward Hodgson*.

The declaration was against them *jointly* in the common form, *viz.* "That the said *James* and *John Palmer* and *Edward Hodgson* made their certain note in writing, commonly called a Promissory Note, their proper hands-writing being thereto subscribed, &c. &c."

Hodgson, one of the defendants, had pleaded a sham plea of a judgment recovered, to which there was the usual replication of *nul tiel record* and demurrer, in which state the pleadings then stood as to him: the two other defendants, *James* and *John Palmer*, severally pleaded *non assumpsit*; and these were the issues in the cause on the record.

The counsel for the plaintiff proved the hands-writing of *James* and *John Palmer*, and there rested their case.

The counsel for the defendants insisted, that this alone was not sufficient, for it was also necessary to prove the hand-writing of *Hodgson* the other defendant, inasmuch as the plaintiffs had declared on a joint contract against the three defendants.

It was answered, That *Hodgson* had by his plea admitted the note to be his, and that it was therefore only necessary to prove it against those parties who by their pleas had denied it to be theirs; and that that being proved as to them, gave the plaintiff sufficient title to recover. [136]

Lord

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GRAY et alt. *against* PALMERS and HODGSON.

Lord KENYON ruled, that it was necessary to prove the hands-writing of all the parties to the note. His Lordship said, that as between the plaintiffs and *Hodgson* it was unnecessary to prove his hand-writing, he having by his plea of judgment recovered, not denied it; but that the other defendants had a right to have the declaration proved, which could only be by proving the hands-writing of all the defendants subscribed to the note, as the plaintiffs had averred in the declaration they had done.

[137] *Erskine* and *Walton* for the plaintiff.

Espinasse for the defendants.

SITTINGS AFTER TERM AT WESTMINSTER.

Friday, June 6th.

CLARKE *against* DENOVAN.

Though the whole of the business done by an attorney has been at the quarter-sessions, he shall deliver his bill signed a month before he sues on it, pursuant to stat. 2 *Geo.* 2.

THIS was an action of *assumpsit* brought by the plaintiff, who was an attorney, to recover the amount of his bill of costs from the defendant.

Plea of the general issue.

The business done had been in carrying on a prosecution at the quarter-sessions for an assault at the suit of the defendant the whole of the charges were on this account, so that none of the items were for business done in the courts above.

The plaintiff had not delivered any bill signed, pursuant to stat. 2 *Geo.* 2. 23., supposing it to be unnecessary, as none of the business had been done in the courts above.

Mingay for the defendant contended that the plaintiff should be nonsuited, as the statute requiring an attorney's bill for business done, to be delivered a month before action brought, and to be regularly signed, &c. was general, and so extended to business done at the sessions, as well as to business done in the courts at *Westminster*; and to that purpose cited *ex parte Williams*,
[138] 4 *Term Rep.* 496., where bills for business done entirely at the sessions had been referred to the Master to be taxed, where it is stated that such was a common practice.

The counsel for the plaintiff admitted, that where any part of the business had been done in the courts above, and the remainder at the quarter-sessions, the whole of the bill might be referred to the Master to be taxed, and of course ought to be delivered pursuant to the statute; but they contended, that where

the

the whole of the business had been done at the sessions, there was no instance of referring an attorney's bill to be taxed, and cited *ex parte Williams*, 4 *Term Rep.* 124., and another case before Mr. Justice *Buller*, at *York* assizes 1786, (*vide Espin. N. P.* 9. *S. C.*) where, in an action on an attorney's bill for business done wholly at the sessions, and no bill had been delivered, that learned Judge had ruled it to be unnecessary.

1794. — CLARKE *against* DENOVAN.

Lord KENYON said, that he was of opinion that the clause in the 22d section of the act of parliament, requiring a bill to be delivered, was not restrained to business done in the courts above, but extended to business done at the sessions (*a*); and that the plaintiff therefore ought to have delivered a bill pursuant to the directions of the statute. But as the point had not received any judicial decision, he suffered the plaintiff to take a verdict, with liberty for the defendant to move to set it aside, and enter up judgment of nonsuit. 139

Erskine, *Garrow*, and *Shepherd* for the plaintiff.

Mingay and *Reader* for the defendant.

In the next term *Mingay* moved accordingly, and it was resolved by the Court, that there was no reason for restraining the general words in the first part of the clause by those which followed; and the former words being general, extending to all cases of business done at law or equity; and the practice of the court having been to tax the bills for business done at sessions, that in the present instance the plaintiff ought to have delivered a bill pursuant to the statute; and not having done so, there should be judgment of nonsuit. *Vide* S. C. 5 *Term Rep.* 694.

(*a*) By § 22. stat. 2 *Geo.* 2. 23. it is enacted generally, "that no attorney shall commence any action for the recovery of any fees, charges, or disbursements at law or equity, until one month after he shall have delivered to the party, or left for him at his dwelling-house, a bill of fees, and subscribed with his own hand." And the same clause afterwards goes on to enact, that the party chargeable by such bill may, upon application to the Lord Chancellor, Master of the Rolls, or to any of the Courts aforesaid, or to a Judge or Baron of any of the said Courts in which the business contained in such bill had been done, have the said bill referred to the proper officer to be taxed, &c. &c.

Vide *Brooks* v. *Mason*, 1 *H. Bla.* 290. *Winter* v. *Payne*, 6 T. R. 615.

Saturday, June 7th.

SILK *against* OSBORN.

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An uncertificated bankrupt may maintain an action for work and labour, and materials found, and not for work and labour only.

THIS was an action of *assumpsit* for work and labour, and materials found, with the usual counts.

Plea of the general issue.

The

1794.

SILK *against* OSBORN.

The plaintiff proved the declaration, the work done, and the materials furnished by him; but in the course of the evidence it appeared that the plaintiff, at the time of the work and labour done, and then, was an uncertificated bankrupt.

Garrow for the defendant contended that he could not maintain the action, as all his effects belonged to his assignees, (*Hopkins* v. *Dewar*, *Bull. N. P.* 153.)

The counsel for the plaintiff relied on the case of *Chippindale* v. *Tomlinson*, *Trin.* 25 *Geo.* 3., reported in *Cook's Bankrupt Laws*, 260., as decisive in the present instance, it being there expressly decided that an uncertificated bankrupt could maintain an action for work and labour.

It was answered for the defendant, that that case only went the length of deciding that an uncertificated bankrupt could sue for and recover any sum due to him for his personal labour; but that the present case was not confined to personal labour only, but embraced a more extensive cause of action, namely, for materials found; that these were a species of property which passed [141] under his assignment, and in which he therefore had no property whatever; so that, even admitting that the action was maintainable by the bankrupt for work and labour, that for materials found, the action could not be supported.

Lord KENYON said, that the case cited was certainly good law, and in principle strongly applicable to the present; that the assignees could not hire out the bankrupt to make a profit of his labour for their benefit, but that for such demands he should maintain an action in his own name; but his Lordship added, that he was further of opinion, that where the materials furnished were necessary to the bankrupt's labour, that in such case the work and materials furnished became blended together, and formed one joint cause of action, upon which the bankrupt might sue, and was entitled to recover; that, however, the question might be between the bankrupt and his assignees, as they might certainly take whatever personal property belonged to him, without any new assignment; that it did not lie in the mouths of third persons to set up such a defence.

The plaintiff had a verdict.

Erskine and *R. Parke* for the plaintiff.

Garrow for the defendant.

Vid. *Webb* v. *Fox*, 7 T. R. 391. *Fowler* v. *Down*, 1 *Bos.* and *Pull.* 44. *Laroche* v. *Wakeman*, *Peake* N. P. Cas. 140. *Evans* v. *Brown*, post, 175.

EMERSON

1794.

EMERSON *against* BLONDEN.

Same day. Where a husband permits his wife to act for him in any department of business, her admissions or acknowledgments are evidence to charge the husband.

ASSUMPSIT for the use and occupation of certain rooms in the plaintiff's house, which had been let to the defendant.

The defendant and his wife had taken the apartments at a certain rent; the wife had made the bargain, and had agreed to give three months' notice of quitting. Having quitted without notice, the action was brought to recover the three months' rent.

A witness for the plaintiff proved a demand of the rent from the defendant's wife, and that she had acknowledged the sum claimed to be due, and had promised payment.

Mingay for the defendant objected to this evidence, as it was admitting the declarations of the wife, and her acknowledgment of debt to charge the husband.

It was answered by the plaintiff's counsel, that the defendant having in the present instance permitted his wife to act for him in making the agreement, and settling the terms upon which the lodgings were taken, that he had thereby constituted her his agent for that purpose, and should therefore be bound by her acts and admissions.

Lord KENYON said, that the rule of law had been correctly stated by the plaintiff's counsel, that where a wife acts for her husband in any business or department, by his authority and with his assent, that he thereby adopts her acts, and must be [143] bound by any admission or acknowledgment made by her respecting that business in which by his authority she has acted for him; and that therefore, in the present case, her admission of the debt due to the plaintiff on account of the lodging was competent and admissible evidence to charge the husband.

The plaintiff had a verdict.

Erskine and *Baldwin* for the plaintiff.

Mingay for the defendant.

Vide *Hobbs* v. *Hill*, 2 Stra. 1094. Anon. 1 Stra. 527. *Alban* and *Wife* v. *Pritchett*, 6 T. R. 680. *Denn* v. *White*, 7 T. R. 112. *Kerslake* v. *Shepherd*, *Esp*. Dig. N. P. 721.

WALDRIDGE *against* KENNISON et alt.

Monday, June 9th.

An admission of a handwriting made by the defendant, pending a treaty for compromising the suit, is evidence against him.

CASE on a bill of exchange against the defendants as joint acceptors.

Plea of the general issue.

The

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WALDRIDGE *against* KENNISON et alt.

The hand-writing of one of the defendants was regularly proved. The proof as to *Kennison*, the other defendant, was thus, that the cause having been entered, and standing for trial at a former sittings, a treaty had taken place between the parties for the purpose of settling the action, in consequence of which the record had been withdrawn. At this treaty, the defendant *Kennison* being asked whether that was his hand-writing subscribed to the note, admitted that it was his. This admission was the only evidence offered by the plaintiff to prove *Kennison*'s hand-writing.

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Garrow for the defendants objected to the admission of this evidence, on the ground that it had been obtained under the faith of a compromise, and pending a treaty between the parties for that purpose.

Lord KENYON said, that certainly any admission or confession made by the party respecting the subject-matter of the action, obtained while a treaty was depending, under faith of it, and into which the party might have been led by the confidence of a compromise taking place, could not be admitted to be given in evidence to his prejudice; but he added, that the fact of a hand-writing being a person's or not stood on a different foundation; it was matter no way connected with the merits of the cause, and which was capable of being easily proved by other means. He was therefore of opinion that such evidence was admissible, and accordingly received it.

Erskine and *Burrough* for the plaintiff.
Garrow for the defendant.

Vide *Rous* v. *Redwood*, post, 155. *Gregory* v. *Howard*, 3 N. P. Cas. 313.

Tuesday, June 10th.

REX *against* BANKS.

The person upon whose suggestion and information a seizure of naval stores is made, is to be deemed the informer, not he who after such seizure informs the Admiralty, or on whose relation the information is filed.

THIS was an information against the defendant under the stats. 9 & 10 *W.* 3. 41., and 17 *G.* 2. *c.* 40. § 10., for having naval stores in his possession.

*The first witness called on the part of the prosecution was a police-officer. He was asked if he had given the information to the Admiralty upon which the stores had been seized: he said that he had made the seizure, but that no information had been given to the Admiralty until that time, when he then informed them that he had done so; but he added, that he had made the seizure in consequence of an information given to him by another person, that such stores were in the defendant's possession.

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Garrow

Garrow for the defendant, objected to the competency of the witness; he said, that under the circumstances stated by the witness, he must be deemed the informer, under the statute 17 *Geo.* II. as the person whom he had mentioned had had no communication whatever with the Admiralty, but the information was filed on the witness's testimony only; and the statute having given a penalty of 200*l.* to the informer, that he was therefore incompetent.

Lord KENYON over-ruled the objection. His Lordship said, that the witness was not the informer within the statute: that *he* was to be deemed the informer upon whose information the seizure had been made, not he who had made the seizure in consequence of such information; in which latter situation the witness stood: he said, that it was like the cases of informations of bribery at elections, under stat. 2 *Geo.* II. *c.* 24.: in which cases it had been resolved, that *he* was not to be deemed the discoverer, in whose name the action for the penalty given by the statute was brought, but he upon whose information and evidence the action was founded, and the conviction made. *Sutton* v. *Bishop*, 4 *Burr.* 2284; and *Sibley* v. *Cuming*, 4 *Burr.* 2464.

He was therefore admitted to give his evidence, and proved the seizing of the several stores mentioned in the information, which were proved to be naval stores belonging to his Majesty. [146]

In an information under these statutes, the defendant is not bound to produce a navy board certificate of the purchase of stores, but may prove by other evidence that he became legally possessed of them.

It was admitted on both sides, that the old and damaged stores belonging to the several yards of *Woolwich*, *Chatham*, &c. were at certain times sold by public auction, in different lots, by authority of the Navy Board; but at those sales, the buyer always received a certificate from the Navy Board that such stores mentioned in the certificate had been sold by them, and that he was the purchaser.

Upon this evidence, it was contended by the counsel for the prosecution, that the acts of parliament having made possession of naval stores, marked with the king's mark, complete evidence of guilt, that the only mode by which the defendant in an information for having such in his possession could discharge himself, was by producing the Navy Board certificate, granted at the time of the sale, as that was the only evidence of the legal possession of them.

Lord KENYON said, that it was clear, that in prosecutions under the statutes in question, it was sufficient for the crown to prove the finding of the stores with the king's mark in the defendant's possession, to call upon him to account for that possession,

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REX *against* BANKS.

[*147]

session, and the manner of his coming by them; so that of course, the *onus* lay on the defendant, of proving that he had legally become possessed * of them; but that it could not bear a question, but that the defendant had other means of shewing that he had lawfully become possessed of them, than by the production of the certificate from the Navy Board: as for example, he might shew that he had bought them from another person who was in the practice of buying stores at the navy sales, and who therefore might fairly be presumed to have had the regular certificate; but who, when he sold part to the defendant, could not, consistent with his own safety, part with the certificate he had obtained, of his having been the purchaser of the whole lot. His Lordship said, he recollected a case in which this doctrine had been held by Mr. Justice *Foster*, who was one of the best crown lawyers that had ever sat in *Westminster Hall*. That if the defendant therefore could shew either a navy certificate, or prove the purchase of the stores mentioned in the declaration, from any person who might be presumed to have been possessed of the proper certificate, from the circumstance of such person's having frequently been a purchaser at such sales, he was of opinion that it was such evidence as ought to induce the jury to find the defendant Not Guilty.

The defendant did give such evidence, and was acquitted.

Bearcroft, *Mingay*, and *Brodrick* for the crown.

Garrow for the defendant.

Vide *Rex* v. *Cole*, post, 169. *Rex* v. *Teasdale*, 3 N. P. Cas. 68.

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HUBERT *against* GROVES.

Same day.

For any obstruction to a public highway, which is a public nuisance, though such should obstruct the party's business, an action on the case cannot be maintained by the party so obstructed: the only remedy is by indictment.

THIS was an action of trespass on the case.

The defendant pleaded the general issue.

The declaration stated, "That the plaintiff being possessed of a certain messuage, &c. had enjoyed, and was entitled to a certain way from and out of the said messuage, &c. through, along, and over a certain street called *Dean-Street*, for himself, his servants, &c. to pass and repass, and to carry all things necessary for his business, as a coal and timber-merchant. The declaration then stated, that the defendant had deprived him of all benefit, profit, and use of the said way, by laying large quantities of earth and rubbish, by which the way was totally obstructed, and the plaintiff prevented from enjoying his premises and

and carrying on his trade in so advantageous a manner as he had a right to do; and by which the plaintiff was obliged to carry his coals, timber, &c. by a circuitous and inconvenient way." Another count laid the way as a common and public king's highway, and averred the obstruction as before.

The evidence in the case proved, that in fact the way in question was a public highway, which the defendant had obstructed by laying on it several cart-loads of soil and rubbish, and which had in truth produced the grievance to the plaintiff complained of in the declaration.

When the case was opened, Lord KENYON expressed a doubt whether the action was maintainable, and whether the only [149] remedy the plaintiff had was not by indictment, as a public nuisance.

It was answered by *Erskine* of counsel for the plaintiff, that unquestionably for a public nuisance the remedy was by indictment only, unless a party had sustained a special injury; and he cited *Co. Litt.* 56. *a*, to that effect. But he contended, that the obstruction complained of by the declaration, was such a particular and special injury and grievance, as entitled the party to his remedy by action.

His Lordship said, that the general principle as to the maintaining of actions for injuries of this description, was as stated by Mr. *Erskine*; but he was of opinion, that the grievance complained of in the declaration was not of that description which entitled the party to maintain an action; that it was an injury to the king's highway, a public nuisance, and the party's remedy was by indictment only, and that the action therefore could not be sustained. He therefore ordered the plaintiff to be called.

Erskine, *Mingay*, and *Barrow* for the plaintiff.

Garrow for the defendant.

In the next term *Barrow* moved for a new trial, on the grounds above taken by *Erskine*, and cited *Hart* v. *Bassett*, Sir *T. Raym.* and 4 *Vin.* 459, and *Maynell* v. *Saltmarsh*, 1 *Keb.* 847.; but the Court concurred in opinion with the Chief Justice, and refused the rule.

Vide *Iveson* v. *Moore*, 1 *Salk.* 15.; where on this question the Court were divided; HOLT, C. J. and ROKESBY, J. holding that the action was not maintainable: TURTON and GOULD, Justices, *contrà*.

SITTINGS

1794.

SITTINGS AFTER TERM AT GUILDHALL.

Wednesday, June 11th.

CHAMBERS *against* GRIFFITHS et alt.

Where a party becomes the purchaser of several lots, at an auction, it shall be deemed an entire contract; and if the seller fails in making a title to any one of them, the party may rescind the contract and refuse to take the others.

ASSUMPSIT for money had and received, with the usual money counts.

Plea of *non assumpsit.*

The action was brought to recover the amount of a deposit made by the plaintiff on a sale by auction, of several houses of the defendants.

The case in evidence was, that the houses in question had, with several others, been put up by public auction, in distinct lots; the plaintiff had bid for three of these lots, which had been knocked down to him, and he had paid the deposit for them required by the conditions of sale.

One of these conditions was, that the purchaser was to have a good title made to him, within a month after the sale. Within the month the defendant sent an abstract of the title; but it was to one of the houses only. The plaintiff insisted upon having a title made to him for the other two houses, or of rescinding the agreement for the whole purchase. The defendants were [151] willing to suffer the plaintiff to abandon his purchase of the two houses, to which they had not sent an abstract; but insisted on holding him to his agreement for the house to which they had shewn a good and sufficient title. The plaintiff refused those terms, and brought his action to recover back the whole of the deposit money.

The defendants paid into Court the amount of the deposit paid to them for the two houses. The plaintiff proceeded in this action for the remainder.

The question therefore was, Whether the plaintiff had a right to consider the contract as at an end, and to recover his deposit for the house to which the defendants had made a title, the defendants having failed in making any title to the others?

Per Lord KENYON.—When a party purchases several lots of this description at an auction, it must be taken as an entire contract; that is, that the several lots are purchased with a view of making them a joint concern. The seller therefore shall not, in case of any defect of his title to one part, be allowed to abandon that part at his pleasure, and to hold the purchaser to his bargain

gain for the residue. From such a doctrine much injustice might result, as the part to which the seller could not make a title might be so circumstanced, that without it the other parts would be of little, or perhaps of no value; or it might leave it in the power of the seller, or any other person who might come to the possession of such part, to deprive the purchaser of every degree of enjoyment, or beneficial use of that part which he had purchased.

His Lordship added, That a case under circumstances precisely similar to the present, had been decided before him when he was Master of the Rolls. That, on that case coming before him, he had found that his predecessor there, Sir *Thomas Sewell*, had ruled contrary to the doctrine he was now delivering; but that he at the Rolls had over-ruled Sir *Thomas Sewell*'s determination, with the general approbation of the bar. [152]

In the present case therefore, as the defendants had failed in making any title to the two lots in question, that the plaintiff had by law a right to rescind the agreement as to the whole, and of course to recover his deposit.

The plaintiff had a verdict.

Erskine and *Baldwin* for the plaintiff.

Garrow and *Lawes* for the defendant.

DRUMMOND *against* DEEY.

Same day.

Where a party knowingly engages with another in an illegal transaction, the money advanced by him in such business is not recoverable in *assumpsit*. *Aliter* where a party has been ignorantly drawn in by the craft or imposition of such person.

THIS was an action for money had and received.

The defendant pleaded the general issue.

The action was brought to recover back from the defendant the amount of several premiums paid by the plaintiff to the defendant, for illegal insurances in the state lottery.

The counsel for the plaintiff relied on the cases of *Jacques* v. *Golightly*, 2 *Black. Rep.* 1073, and *Jacques* v. *Withy*, *H. Black. Rep.* 65. S. P. They proved clearly several illegal insurances * made, and several sums paid by the plaintiff to the defendant, on account of them; but in the course of the evidence it came out that the plaintiff was connected with the defendant in these several illegal insurances; that he kept a house where illegal policies on numbers in the lottery were made, on account of the defendant; and that the sums which he had paid over to the defendant, and for which the present action was brought, were [*153]

the

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the sums paid by the different persons making the insurances as premiums on the policies.

The counsel for the defendant, upon this evidence contended, that the plaintiff could not recover; first, on the ground that the money for which the present action was brought, was not the plaintiff's own money, but paid by others to him on account of the defendant; but secondly, That taking it to be paid by the defendant on his own account; that it was paid in consequence of an illegal transaction, in which both parties were implicated, and therefore came within the principle of the case of *Browning* v. *Morris*, *Cowp.* 790, and within the rule of law, that *in pari delicto melior est conditio defendentis*: but that at all events the plaintiff being a *particeps criminis*, could not have the aid of the Court to assist him in the recovery of any money claimed under such circumstances.

Lord KENYON said, that the idea of a *particeps criminis* being in no case allowed to recover, was too generally put by the defendant's counsel. In this respect, that if a person is ignorantly engaged in an illegal transaction, by means of the imposition or
[154] craft of another, and pays his money in pursuance of it, that in such case, though the party was *particeps criminis*, he would allow him to recover back his money which he had so advanced, as having been obtained from him through ignorance and fraud: but that where a person knew that he was violating the law when he engaged in such illegal transaction, in such case, the party should not be allowed to recover back his money from the person who was a *particeps criminis*. That in the present case, the plaintiff knew that he was violating a positive law, which prohibited such insurances, assisted the defendant in such illegal transaction, and the money was the price of such breach of the law. That the plaintiff therefore could not maintain the action.

The plaintiff was nonsuited.

Garrow and *Baldwin* for the plaintiff.

Erskine for the defendant.

Vide *Booth* v. *Hodgson*, 6 T. Rep. 405. *Mitchell* v. *Cockburn*, 2 H. Black. 380. *Petrie* v. *Hannay*, 3 T. Rep. 318.

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WILSON et alt. Assignees of *WARNER, *against* NORMAN, Sheriff of *Kent*.

Thursday, June 12th.

In an action by the assignees of a bankrupt, to recover from the sheriff, money levied under an execution, subsequent to the act of bankruptcy, the plaintiff must give in evidence the *fieri facias* or the warrant directed by the defendant to the bailiff to levy.

THIS was an action of *assumpsit* brought by the plaintiffs as assignees of *Warner* a bankrupt, to recover from the defendant a sum of money which had been levied by him under an execution against the bankrupt, at the suit of one *Johnson*, after an act of bankruptcy committed.

* The plaintiffs proved the taking and the selling of *Warner's* goods by a person reputed to be an officer of the sheriff of *Kent*, and an act of bankruptcy committed by *Warner* antecedent to this execution and levy, and would then have closed their case.

Mingay for the defendant, insisted that if the plaintiff could not carry his case farther, he must be nonsuited: he contended that there was no evidence whatever which in any manner brought the case home to the defendant; that in order to maintain this action against the sheriff, the money arising from the sale of the bankrupt's effects, must be proved to have come to his hands: and that for this purpose it was necessary to prove a writ of *fieri facias* directed and delivered to the defendant as sheriff, or at least to produce the warrant directed by him to the officer under which the goods had been levied. [*155]

Lord KENYON ruled, that such evidence was necessary; and ordered the plaintiff to be called.

Erskine and *Gibbs* for the plaintiff.

Mingay and *Marryat* for the defendant.

Vide *Drake* v. *Sykes*, Bos. 7. T. R. 113.

ROUSE, Executor, *against* REDWOOD.

Friday, June 13th.

Any admission of a demand, or confession to that effect, made by a defendant when he is arrested, and is ignorant whether he is bound by law to the payment of the demand or not, is inadmissible evidence to charge him.

THIS was an action of *assumpsit* against the defendant, as the indorser of a promissory note.

The note had been dishonoured by the drawer, and due notice not having been given by the holder to the defendant the indorser, he was by reason of their laches discharged.

The plaintiff was aware of the circumstance of want of notice, and therefore endeavoured to avail himself of a new promise, as a waiver of his laches.

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ROUSE, Executor, *against* REDWOOD.

The evidence to prove this new promise, was the bailiff who had arrested the defendant in the present action; he swore, that on his arresting the defendant, he had said, "that it was true the note had his name on it, but that he had security, though he wished for time to pay it."

The counsel for the plaintiff contended, that this was a new
[156] promise, and a waiver of the laches.

Per Lord KENYON. When a person is arrested, and at the time ignorant of his rights, or whether he is bound by law to pay the demand or not, and under such circumstances makes any confession, and seemingly admits the demand, such admission shall not be allowed to be given in evidence to charge him.

Erskine and *Wigley* for the plaintiff.

Mingay for the defendant.

Vide ante 143, *Waldridge* v. *Kennison* et *Cas*, ibid.

END OF EASTER TERM.

CASES

CASES

ARGUED AND RULED

AT

NISI PRIUS,

IN THE

KING'S BENCH;

IN

TRINITY TERM, 34 GEORGE III.

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FIRST SITTINGS IN TERM AT GUILDHALL.

COLLINS *against* RYBOT.

In debt on bond for the performance of covenants in a lease, judgment and suggestion of damages to be assessed on the writ of enquiry, the lease need not be proved.

THIS was an action of debt on bond.

The defendant craved *oyer*, and set out the bond and condition, which appeared to be for the performance of covenants in an indenture of lease therein mentioned, between the plaintiff and a third person; he then pleaded a sham plea of judgment recovered, to which was the common replication of *nul tiel record*. Demurrer and judgment for the plaintiff.

Under statute 8 & 9 *W.* III. *ch.* 10. the plaintiff suggested a breach of covenant in the indenture of lease referred to in the condition of the bond, which was non-payment of rent by that third person, upon which a writ of inquiry issued, under the statute, in order that the jury might assess the damages really sustained. [158]

This writ of inquiry is under the stat. to be executed before the judge of assize or *nisi prius*, and now stood in Lord KENYON's paper for trial.

It became a question at the trial whether it was incumbent on the plaintiff to prove more than the damage as suggested on the

record,

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record, or whether he was not also obliged to prove the execution of the indenture of lease set out in the plea, by the subscribing witness?

Lord KENYON ruled that it was not necessary to prove the execution of the lease, for that the defendant having set out the condition of the bond in his plea, which stated the bond to be for the performance of covenants in such lease, was estopped from saying that the lease was not duly executed.

The plaintiff had a verdict for the rent arrear, as suggested.

Barrow for the plaintiff.

Bower for the defendant.

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LAST SITTING IN TERM AT WESTMINSTER.

KNOX *against* WHALLEY.

Where an account for goods sold is settled, and the party gives a bill of exchange for the amount, but which bill is not paid, on an action brought, the party cannot go into evidence to impeach the charges in the first account which has been settled.

ASSUMPSIT for a tailor's bill.

Plea of *non assumpsit*.

The evidence on the part of the plaintiff was, that sometime before, a bill amounting to 74*l*. for clothes, &c. furnished by the plaintiff, had been delivered to the defendant, and that he had given the plaintiff in payment a bill of exchange, drawn by him on Lord *Massareene* for 84*l*. and had received the difference; that that bill not having been paid when it became due, the present action was brought for the amount of it, and for another sum due to the plaintiff, for clothes furnished to the defendant since the bill of exchange had been given.

At the trial, the defendant was proceeding to impeach the plaintiff's charges for the several articles contained in the first bill of 74*l*. This was objected to by the counsel for the plaintiff, who contended, that as to that demand all matters must be held to be concluded by the giving of the bill of exchange, and that the items could not therefore be impeached.

It was ruled by Lord KENYON, That up to the time of giving this bill of exchange, all matters must be considered as so far [160] closed, that it should not be in the power of the defendant to rip up accounts which had been so settled; nor should he be allowed to go into evidence of any of the articles previous to that time, having been exorbitantly or unreasonably charged; but

but that the giving of the bill must to that effect be taken as conclusive evidence of the sum due at that time.

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KNOX *against* WHALLEY.

Erskine and *Baldwin* for the plaintiff.

Garrow for the defendant.

SITTINGS AFTER TERM AT WESTMINSTER.

BUTCHERS' COMPANY *against* JONES, Esq.

July 10th.

Where an objection to the competency of a witness arises out of an answer to a question put on his cross examination, he shall be in the same manner allowed to restore himself to competence, by shewing the disability removed.

THIS was an action of trespass upon the case, against the defendant as marshal of the King's Bench prison, for an escape.

Plea of Not Guilty.

The declaration stated, that the plaintiffs having brought an action of debt against one *Davies* for the penalty of a bye-law of the company, for exposing meat to sale on a *Sunday*, had recovered a verdict against him, and had charged him in execution for the debt and costs. It then stated that the defendant had voluntarily permitted the defendant in that action to escape, and to go at large, without the rules of the prison, &c. &c.

* To prove the escape, a witness was called, who was the beadle of the Butchers' Company.

[*161.]

He was asked on his *voire dire* by *Bearcroft*, of counsel for the defendant, if he was not free of the *Butchers' Company?* He answered that he was not *then;* that he had been free of the *Company*, but had been disfranchised. He was then asked, if the disfranchisement of members was not regularly entered in the Company's books? He answered, that he believed it was.

Bearcroft then insisted that the books of the *Company* wherein the witness's disfranchisement had been entered, should be produced by the plaintiff, in order to render the witness competent, by shewing, by the best evidence, his disability from interest removed.

Lord KENYON over-ruled the objection: he said that the objection to the competency of the witness, having arisen out of an answer to a question put by the defendant's counsel, in which he had admitted that at one time he had been incompetent, that he should be allowed to restore himself to competency by the same means; that was, by stating by parol, either as part of his answer to the question so put, or to one put by the plaintiff's counsel, Whether he was then disfranchised or not?

Having

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BUTCHERS' COMPANY *against* JONES, Esq.

[*162]

Having stated that he was then actually disfranchised, his testimony was admitted.

* *Mingay* and *Lambe* for the plaintiff.

Bearcroft, *Erskine*, and *Garrow* for the defendant.

Vide post, 164, *Botham* v. *Swingler*.

Tuesday, July 15th.

HOWES *against* MARTIN.

When a party desires an action brought against another person to be defended, in which action he is concerned, and may be benefited by the event; and such is defended, and the party fails, he is liable to pay the expences of the defence; nor is it within the statute of *Frauds*, in such case, requisite to have a note in writing.

ASSUMPSIT for money laid out and expended to the use of the defendant, with the common counts.

Plea of the general issue.

The circumstances of the case in evidence were, that the plaintiff and defendant having lived in habits of intimacy, the plaintiff had been induced out of motives of friendship, and merely to accommodate the defendant, to accept several bills of exchange, on his account. These bills had all been regularly taken up, when they became payable, by the defendant, except the last, which was for 20*l.* This bill had come into the hands of one *Greensill*; and the defendant being unable to take it up when due, had prevailed upon *Greensill* to accept 16*l.* in part, and the plaintiff's acceptance for six guineas, being the balance of the bill, with the interest then due for the remainder.

This bill for six guineas not being paid when due, *Greensill* brought his action on it against *Howes* the now plaintiff, as the acceptor, in the Court of Common Pleas. On the action being brought, the plaintiff acquainted *Martin* with the circumstance; and he desired the present plaintiff to defend the action, representing to her, that as she never had any consideration for the acceptance, that she might safely do it. In consequence of

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which representation, she did defend the action; and *Greensill*, the plaintiff in that action, obtained a verdict against her for the amount of the bill, which with the costs amounted to 32*l.* To recover which sum the present action was brought.

Garrow for the defendant, upon this evidence objected: that under the statute of *Frauds* this action was not maintainable, inasmuch as there was no note in writing; and the object of the action was to recover from the defendant a sum of money, which was the debt and costs in an action against the plaintiff herself, on her own acceptance; and which therefore was to be deemed her own debt. He cited to this effect a case of *Hitchcock* v. *Hicks*, said to have been decided before Lord KENYON, at the

sittings

sittings after *Hilary Term* preceding, as in point. In that case the plaintiff and the defendant having made an exchange of lands, of which each were lessees, and an action having been brought against the plaintiff, for waste committed by the defendant on the lands which he occupied, in consequence of the exchange, but of which the plaintiff was the lessee, and a verdict having been obtained against him for the injury, and damages recovered, and he having brought that action to be reimbursed the costs incurred in that action,—Lord KENYON had ruled, that the action could not be maintained, there having been no note in writing.

It was answered by the counsel for the plaintiff, that in order to bring the case within the statute of *Frauds*, that it should appear that the defendant was called upon to pay a debt [164] of the plaintiff's own; but in the present instance the plaintiff never owed any; as the acceptance had been for the defendant's use, not for hers, and the defence to the action undertaken for his benefit.

Lord KENYON over-ruled the objection, and held that the case was not within the statute of *Frauds*. His Lordship said, that in this case it appeared that the plaintiff never had any consideration whatever for her acceptances, which were given merely on the defendant's account and for his use; that the defence to the action on the note was on his account, and from whence he could have derived a benefit: that as he therefore was personally interested and directed the defence to be made, by which he might have been benefitted, that the money must be considered to have been laid out by the plaintiff on his account, and to his use, and that she therefore was entitled to recover it back from him.

Erskine and *Espinasse* for the plaintiff.

Garrow for the defendant.

Vide *Stephens* v. *Squire*, 5 Mod. 213, Comb. 362. *Williams* v. *Leper*, 3 Burr. 1884. *Holditch* v. *Milne*, 3 N. P. Cas. 86. *Winkworth* v. *Mill*, post, 484.

BOTHAM

1794.

Wednesday, July 16th.

BOTHAM *against* SWINGLER.

Where an objection to the competency of a witness arises out of his answer to a question on his *voire dire*, he shall by parol be allowed to restore himself to competency; though had the objection to his competency arisen by any other means, the best evidence would be required to restore him to competency, and parol would be insufficient.

THIS was an action brought by the plaintiff, as assignee of a bankrupt.

A witness was called to prove the petitioning creditor's debt * which was by a note of hand. He was asked upon his *voire dire*, if he was not a creditor under the commission? he said that he had proved a debt under the commission; but that since that time he had himself become a bankrupt, and had obtained his certificate.

Garrow objected. That the fact of the witness's having obtained his certificate, could only be proved by the production of the certificate itself.

Erskine in reply, cited the case of the *Butchers' Company* v. *Jones*, *ante* 160, as deciding that the evidence was admissible.

Lord KENYON said, That the rule, as there laid down, was the true one; that when the objection to the competency of a witness arose from his answer to a question on his *voire dire*, that he might in the same way do away the objection, and restore himself to competency by parol. But his Lordship added, that had the fact appeared in evidence in any other manner; as [*165] had the witness been proved by other evidence to have been a bankrupt, in such case it would have been necessary to have answered the objection by the best evidence; that is, by production of the certificate itself.

Erskine and ———— for the plaintiff.

Garrow for the defendant.

Ante *Butchers' Company* v. *Jones*, 160.

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Same day.

STEERS *against* LASHLEY.

Where a broker pays money on account of illegal stock-jobbing transactions for his principal, and the principal pays him the money so advanced, by a bill of exchange, an indorsee who knows the consideration of the bill cannot recover on it.

ASSUMPSIT on a bill of exchange by the plaintiff as indorsee, against the defendant, as the acceptor.

The case in evidence at the trial was, that the defendant having been engaged in many stock-jobbing transactions, had employed a person of the name of *Wilson* as his broker; *Wilson* had paid the differences with his own money; but some disputes

as

as to the amount of what he had paid having arisen between him and the defendant, they had agreed to refer the matter to arbitration, and the plaintiff, together with two other persons, had been appointed arbitrators. They undertook the arbitration, and awarded a sum of 306*l.* 12*s.* 6*d.* to be due by the defendant to *Wilson*; this sum was to be paid by bills at different dates; one for 100*l.*, part of the above sum, was drawn by *Wilson* on the defendant, and he had accepted it, *Wilson* indorsed the bill to *Steers* the plaintiff, and upon it the present action was brought.

On the part of the defendant it was objected, that the plaintiff could not maintain this action; that the bill having been given for a consideration, which was contrary to law, and that known to the plaintiff, he having been the arbitrator who had awarded that the money was due by the defendant, that he could not maintain an action for it.

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A party, by agreeing to refer the *quantum* of a demand to arbitration, does not thereby waive any objection to the illegality of it, in case he is sued for the sum awarded to be due.

It was answered by *Erskine* for the defendant, that under the authority of the case of *Faickney* v. *Reynous*, 4 *Burr*. 2609, which had been adopted in the recent case of *Petrie* v. *Hannay*, 3 *Term Rep*. 418., that though the claim might arise out of an illegal transaction in the stocks, if the party bringing the action had no concern himself in the transaction, that he could maintain an action on it; and upon the principle of the same cases he contended, that *Wilson* having laid out his own money on account of the defendant, that he could maintain an action for the sum he had so paid on the defendant's account, and *à fortiori* that the bill would be good in the case of the plaintiff, who was an innocent indorsee: but at all events he contended, that the demand having accrued in consequence of a transaction which was only *malum prohibitum*, that the defendant having agreed to refer the matter to arbitration, had thereby waived the illegality.

Lord Kenyon said, that if the first transaction was illegal, that the defendant, by agreeing to refer it, had not precluded himself from impeaching it; for, as to that, the rule of law was, *quod initio non valet, tractu temporis non convalescat*: that as to the transaction upon which the note was given, he was of opinion it was illegal, and such as precluded the plaintiff from recovering. His Lordship said, that the cases cited only established, that money fairly lent by one person to another, who applied it in payment of money due on account of prohibited stock-jobbing transactions, was recoverable; but that here the note had been given as payment for the differences arising from such illegal transactions, and that known to the plaintiff [168] from

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STEERS *against* LASHLEY.

from his situation as arbitrator between the parties, that he therefore could not recover on it.

His Lordship therefore ordered the plaintiff to be called.

Erskine and *Leach* for the plaintiff.

Garrow for the defendant.

In the next term *Erskine* moved and obtained a rule to set aside the nonsuit; but the Court, without hearing the defendant's counsel, discharged the rule. S. C. 6 *Term Rep.* 61.

Vide *Drummond* v. *Decy*, ante, 152.

DOWTON et alt. *against* CROSS, Esq. Sheriff of BEDFORDSHIRE.

Same day.

An acknowledgment by the bankrupt, that before the act of bankruptcy he owed to the petitioning creditor above 100*l.* made before the suing out of the commission, is good evidence to prove the petitioning creditor's debt.

TRESPASS on the case by the plaintiff as assignee of a bankrupt, against the defendant, for a false return.

Plea of Not Guilty.

The action was brought for the purpose of trying the right of the assignees of the bankrupt to certain goods which had belonged to the bankrupt, and which had been taken under an execution against him at the suit of another creditor; the levy being, as the plaintiff asserted, subsequent to an act of bankruptcy.

[*169] * The proof of the petitioning creditor's debt was an acknowledgment made by the bankrupt himself to the witness, that he was indebted to the petitioning creditor in the sum of 100*l.* and upwards, but which acknowledgment was made by the bankrupt on the same day on which the act of bankruptcy was proved to have been committed.

The counsel for the defendant objected to this evidence, inasmuch as by law the petitioning creditor's debt ought to be prior to the act of bankruptcy.

Lord KENYON over-ruled the objection, and held that the evidence was sufficient, and further that an acknowledgment by the bankrupt that he owed the petitioning creditor 100*l.* before the act of bankruptcy, made at any time before the suing out of the commission, was sufficient to support the commission.

Garrow and *Lawes* for the plaintiff.

Erskine and *Giles* for the defendant.

Vide *Chapman* v. *Gardener*, 2 H. Black. 279. *Field* v. *Curtis*, 2 Stra. 829.

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REX *against* COLE.

Thursday, July 17th.

The informer, under stat. 17 *Geo.* 2. 40. and 9 and 10 *W.* 3. 41., against any person for having naval stores in his possession, is a competent witness to prove the fact, the objection arising from interest; the statutes having inflicted a pecuniary penalty, goes only to his credit.

IN this case, which was an information against the defendant, for having naval stores in his possession, contrary to the statute 17 *Geo.* 2. 40. and 9 and 10 *W.* 3. *c.* 41., a witness was called to prove the case, who appeared to be the informer, and was objected to as incompetent, on the authority of *The King* v. *Blackman, Hil.* 34 *Geo.* 3. 1st part of these cases, fol. 95.

Lord KENYON said, that since the decision of that case he had considered of the objection to the competency of the informer's being a witness on the ground of interest; that the statute having given the Court a power to inflict, at their discretion, either a corporal punishment, or to impose a fine in case of conviction, and as it was only in case a fine was imposed that the witness could expect to derive any benefit, and that was uncertain, as depending upon the judgment of the Court;—that he was now of opinion that the objection went to the credit, not to the competency of the witness, and that therefore his evidence was admissible; and he accordingly received his testimony.

Bearcroft, Mingay, and *Brodrick* for the prosecution.

Erskine for the defendant.

Vide *Rex* v. *Blackman,* ante, 95.

SITTINGS AFTER TERM AT GUILDHALL. [170]

EVANS *against* BROWN.

July 11th.

An uncertificated bankrupt may maintain an action for money lent. *Buller's* N. P. 152.

THIS was an action of *assumpsit* for money lent and advanced. Plea of the general issue.

It was proved that the plaintiff, at the time of lending the money to the defendant, was an uncertificated bankrupt.

For the defendant it was objected, that this was ground of nonsuit, as an uncertificated bankrupt could not maintain an action for money lent; that though the case of *Chippendale* v. *Thomlinson, Cooke's Bank. Law,* had established that an uncertificated [171] bankrupt could maintain an action of *assumpsit,* that that was for work and labour only done after the bankruptcy, and went on the principle that the assignees could not hire out the bankrupt, but that he was entitled to sue for the profits of his personal labour;

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EVANS *against* BROWN.

labour; but that here there was no pretext for saying that this was a species of demand within the principles of the case of *Chippendale* v. *Thomlinson*, inasmuch as upon the face of the declaration it was for money lent, and proved by the evidence that the demand had accrued on that account; that this therefore was in fact the money of the assignees, for which the bankrupt himself could maintain no action.

Lord KENYON said, that in this case the loan was subsequent to the bankruptcy, and, for any thing that appeared, the money might have been earned by the bankrupt after his bankruptcy; that if the law allowed him to maintain an action to recover what was due to him for labour, that he was equally entitled to maintain one for the money so earned by his manual labour, which he might have lent to a third person, and which might be perhaps the present case; and though, when recovered, it would belong to the assignees, that in this case, and between the parties so circumstanced, it could not be set up to bar this demand.

The plaintiff had a verdict.

Shepherd for the plaintiff.

Reader for the defendant.

Vide ante, *Silk* v. *Osborn* & *Cas.* ibid. cit.

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Friday, July 18th.

BRISTOW et alt., Assignees of CLARK and GILSON, Bankrupts, *against* EASTMAN.

An action for money had and received will lie against an infant, to recover money which he had embezzled.

ASSUMPSIT for money had and received to the use of the plaintiffs, with the usual money counts.

The case, as it appeared in evidence, was, that the defendant had been apprentice to the bankrupts before their bankruptcy; that his principal employment, while he was in their service, had been in passing the ships engaged in their trade at the custom-house, in making payments and receiving money in that employment; but that, in making out his returns to them of the monies expended on that account, he had made many very considerable overcharges, by which he had defrauded them of a very considerable sum of money, to recover back which was the object of the present action.

Mingay for the defendant rested his defence upon two points: the first was, that during the time that he had been so employed by the bankrupts he was an infant, and that therefore an action

for

for money had and received, which was founded on a contract, could not be maintained against him. The second was, the production of a receipt in full of all demands, given by one *Lempriere*, who was joint assignee with *Bristow* the plaintiff to the bankrupts, on which the counsel relied, that having been given under knowledge of all the circumstances, it was a complete defence to the present action.

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BRISTOW et alt. *against* EASTMAN.

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Upon the first point Lord KENYON said, that he was of opinion that infancy was no defence to the action; that infants were liable to actions *ex delicto*, though not *ex contractu*, and though the present action was in its form an action of the latter description, yet it was of the former in point of substance; that if the assignees had brought an action of trover for any part of the property embezzled, or an action grounded on the fraud, that unquestionably infancy would have been no defence; and as the object of the present action was precisely the same, that his opinion was, that the same rule of law should apply, and that infancy was no bar to the action.

Infants are liable to actions *ex delicto*, but not to actions *ex contractu*, unless they arise from fraud. Contra *Beal* v. *Hiscox*, E. 39, *G.* 3.

To the second point respecting the receipt the evidence was, that the embezzlements and frauds committed by the defendant while in the bankrupts' employment having been discovered, and he, having been charged with them, had confessed them, but pleaded inability to pay the whole, and offered 20*l.* in satisfaction; that *Bristow*, one of the assignees, and the now plaintiff in the action, had refused to take it, but that *Lempriere*, the other assignee, had received the 20*l.* which the defendant had offered, and had given him the receipt in full upon which the present question arose, but with the express dissent of *Bristow*.

A receipt in full is conclusive evidence, when given under a knowledge of all circumstances then depending between the parties.

The counsel for the plaintiff contended, that in order to give a valid discharge of any claim due to the bankrupt estate, that the concurrence of all the assignees was necessary, and that the receipt therefore of *Lempriere* could not operate to discharge the defendant without the concurrence of the co-assignee.

Aliter when given without such knowledge.

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Lord KENYON said, that a receipt in full of all demands, when given with complete knowledge of all the circumstances, was a conclusive bar to the action, and the party giving it should not be allowed to rip up the transaction which had been so closed, and concluded: But that in order to make such receipt conclusive, it must be given by one having full authority to do so; that all the rights of property of the bankrupt centered in the assignees, and though the act of one in receiving part of the bankrupt estate, might, if fairly done, bind the estate by

One assignee of a bankrupt estate cannot give a valid receipt for money due to the estate, where the express dissent of the other assignee appears.

1794.

BRISTOW et alt. *against* EASTMAN.

by any discharge he might give for it, that it could never be, that where one assignee had shewn his express dissent, that the other might give a receipt, binding on the estate; as such a construction would enable one assignee, to dissipate and destroy the estate, in despite of his brother trustee: That as therefore in the present case the receipt had been given without the consent or concurrence of the other assignee, and was in fact giving up a legal demand belonging to the estate, that it should not avail to bind it, or to prevent the other assignee from recovering.

The plaintiff had a verdict.

Garrow and *Lambe* for the plaintiff.

Mingay and *Marryat* for the defendant.

Vide *Jennings* v. *Rundal*, 8 Term Rep. 335, where it was decided, that a plaintiff cannot convert an action founded on a contract into a tort, in order to charge an infant defendant. The action was for overriding the plaintiff's mare. *Smith* v. *Jameson*, ante 114.

[175]

Same day.

CHIVERS *against* BRAND.

That a witness is liable to be rated to any assessment, is no objection in an action against the collector of such assessment, for embezzlement of the sums collected under it.

DEBT on a bond dated the 29th of *August* 1787, entered into by the defendant, as surety for one *Stephenson*, on his being appointed collector of the watch-rate for the united parishes of St. *Andrew*, *Holborn*, and St. *George* the *Martyr*.

Plea of *nil debet*.

The breach assigned was, that *Stephenson* had not paid over the several sums of money which he had received as collector aforesaid, &c.

Gliddon the vestry clerk was called as a witness, to prove the facts of the case. He was asked by *Garrow* of counsel for the defendant, if he was not a parishioner, and liable to be rated to the payment of these rates of which *Stephenson* had been the collector?—He said he was a parishioner, and he supposed liable to be rated, but that it had never been the practice to rate the vestry clerk. *Garrow* then objected to his being admitted to give evidence.

Lord KENYON said, that merely being liable to be rated was not an objection. That in cases on the poor laws, it had been so ruled, and the cases were precisely parallel. He therefore admitted him.

Erskine and *Gibbs* for the plaintiff.

Garrow and *Walton* for the defendant.

Vide *Rex* v. *Prosser*, 4 T. R. 17.

RICH

1794.

Rich et alt. *against* Topping.

The indorser of a bill of exchange may be a witness to prove that the indorsee received it under an usurious transaction, on receiving a release from the acceptor.

ASSUMPSIT on a bill of exchange by the plaintiff as indorsee, against the defendant as the acceptor.

The bill was for 200*l.* drawn four months after date, by one *Thomas Topping*, in his own favour, on the defendant *Timothy Topping*, and accepted by him.

The defence relied on the part of the defendant, was, that the plaintiff had become possessed of the bill by means of an usurious transaction, viz. that in a pretended discount of the bill, the plaintiff had given part in money and 100*l.* in woollen cloths, which were in fact worth but 72*l.*, so that he under colour of the pretended sale of the cloth had taken usurious interest.

To prove this transaction, *Thomas Topping* the drawer was called as a witness, he having been released by the acceptor: he was objected to as incompetent by the plaintiff's counsel; they stated it to be a principle of law, settled by the case of *Walton* v. *Shelly*, 1 *Term Rep.* 296., and adopted in a *dictum* by Lord Kenyon in 3 *Term Rep.* 34., that a person who has put his name on a negotiable instrument, shall never be allowed by his testimony to invalidate it: that though it had been allowed to admit the drawer, on receiving a release from the acceptor, to prove the want of consideration; that it had never gone the length of allowing a party to a bill of exchange, to [177] impeach the consideration in the manner now attempted: that the witness was interested clearly to destroy this note, which proof of usury would do, and though it would not have that immediate effect from the present action as to him, it might eventually have that effect, as the plaintiff, if he failed in this action, would not risque another against the witness, as drawer; and that as to the release to him from the acceptor, that could have no manner of effect, as he still would remain liable to the plaintiff as indorsee.

Rex v. *Eden*, ante 97.

Lord Kenyon over-ruled the objection, and held the evidence to be admissible; his lordship said, that, as to the case of *Walton* v. *Shelly*, there had been different opinions about it since, and as to the words imputed to him in the 3 *Term Reports*, he had never used them: that the verdict in this cause could

1794.

RICH et alt. *against* TOPPING.

could not be given in evidence, in any action afterwards to be brought against the witness as drawer of the bill, so that he was completely uninterested in the event of the present action, and therefore on his receiving a release from the acceptor, was a competent witness—and his Lordship accordingly admitted him.

Where goods are given in discount of a bill, is a question for the jury, whether they are so much overvalued as to be a colour for usury.

To prove the usury from an overcharge of the goods by the plaintiff, much above their value, it was given in evidence, that they were valued in the discount of the bill at 93*l.* and that they produced when sold but 72*l.*: But this evidence was rebutted by shewing that the goods were really of the best quality, chosen by *Topping* the witness, who had discounted the bill, with particular care, and that the reason why they had produced on the sale a sum so far short of that at which they had been valued, was that they had been sent to the auction room of *Fellows* and *Myers*, a place appropriated for bankrupt sales, and notorious for raising money on goods, by necessitous persons [178] in trade, and that at such places goods never brought their full value.

In summing up the evidence to the jury, his Lordship said, that in discount of a bill a person may give goods in part, and that it shall not be deemed usury, if the goods are charged at rather an high price provided it is not so extravagant, that it appears to be for the purpose of reserving exorbitant interest, under cover of it: that it was the province of the jury to decide, whether on the evidence, the difference in value of the goods charged in the discount, and that which they sold for in the hands of the party who took them in discount, was such as would warrant them to say, that the value was so much overcharged, as to shew that it was a cover for usury.

The plaintiff had a verdict for 180*l.*

Erskine and *Espinasse* for the plaintiff.

Garrow and *Marryat* for the defendant.

Vide *Jordain* v. *Lashbrook*, 7 T. R. 601. *Buckland* v. *Tankard*, 5 T. R. 578. *Pratt* v. *Willey*, ante 40.

LLOYD

1794.

LLOYD *against* WILLAN.

Monday, July 20th.

Where one party in a cause offers to the other party to settle it, if an affidavit is made of certain facts which are disputed, and the affidavit is made, it shall bind the party; nor shall he be permitted to dispute the question by a trial.

THIS was an action on the case against the defendant, as the proprietor of the *Leeds* waggon, brought to recover from him * the value of a parcel sent by the plaintiff, by that conveyance, to be delivered at *Baldock* in *Hertfordshire.*

The parcel in question had been sent by the plaintiff's porter, to the waggon office of the defendant; and it being then shut, he had left it with the porter of the inn.

The only question in the case respected the delivery; the porter of the plaintiff affirming that he had delivered it as above stated, to the defendant's porter, which he denied.

While the suit was depending, the attorney for the defendant proposed to the plaintiff's attorney, that if the plaintiff's porter would make an affidavit, that he had delivered the goods to the defendant in the manner stated, that his client should [*179] pay the value of the parcel, without further trouble or proceeding in the action.—The plaintiff's porter, on such proposal, did make the affidavit required: but on the circumstance being communicated to the defendant (the offer having been made by his attorney without his knowledge); he refused to be bound by it, and insisted on trying the cause.

Erskine for the plaintiff, insisted, that this precluded the defendant from going into any case; he said that Lord *Mansfield* had ruled, that where a party offers to settle an action on the terms, that the witness who was to prove the case would make an oath of the fact, which was the foundation of the demand, that that should conclude the party who had made the proposition, and bind him to abide by it.

Lord KENYON said, that he was of the same opinion—that to make a proposition such as the present, and afterwards to [180] recede from it, was *mala fides*, but that beside that, it might be turned to very improper purposes, such as to entrap the witness, or to find out, how far the party's evidence would go in support of his case.—He therefore was of opinion, that the defendant should be bound by it, and precluded from going into any evidence whatever on the case.

The plaintiff had a verdict.

Erskine and *Reader* for the plaintiff.

Mingay and *Baldwin* for the defendant.

1794.

Same day.

Smith et alt. *against* Clarke.

Where a bill is by the payee indorsed in blank, a subsequent indorsee shall not by any special indorsement restrain its general negotiability, so far as to make it necessary to prove the hand-writing of such special indorsee, where the action is by a subsequent *bona fide* holder.

[*181]

ASSUMPSIT against the defendant as acceptor of a bill of exchange.

The bill was drawn in favour of *Lisle* and Co. and they had indorsed it to *Surtees, Burden* and Co. who had indorsed it to one *Jackson*; the first indorsement was general, but the indorsement to *Jackson* by *Surtees, Burden* and Co. was a special one, viz. "Pay the contents to *J. Jackson* or order."

Jackson was the receiver general of one of the Northern counties, and kept an account with *Muir, Atkinson* and Co.: This bill had been sent among others to *Muir, Atkinson* and Co. desiring them to get it discounted any where, provided it did not come to the Bank of *England*, but there was no evidence of any indorsement by *Jackson* on it.

**Muir, Atkinson* and Co. discounted it with the plaintiffs who were their bankers.

Muir and *Atkinson* became bankrupts, and soon after *Jackson* also became a bankrupt; and this defence was in fact by his assignees, on the ground, that the indorsement to *Jackson* being special, that it restrained the farther negotiability of the bill, and the plaintiff's right to recover, unless *Jackson*'s indorsement was proved.

For the plaintiff it was contended, that the first indorsement being general, that the bill thereby acquired a general negotiability, nor could it by any subsequent indorsement be restrained, and that how many names soever appeared on the back of the bill, or however many special indorsements such as the present, that the *bona fide* holder might strike out the names of all the intermediate indorsers, and prove only the first indorsement, in order to entitle him to recover.

The counsel for the defendant insisted, that its negotiability could at any time be restrained, and cited *Ancher* v. Bank of *England*, *Doug.* 615. as deciding the point: but they further pressed as a general question, the propriety of admitting special indorsements, for the purpose of greater security, in the remitting bills of exchange by post, to which the restriction contended for would greatly contribute.

The counsel for the plaintiff admitted, that the *payee* might restrain the negotiability of a bill, by a special indorsement,

 but

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SMITH et alt. *against* CLARKE.

but contended that it was confined to him, and did not extend to any *subsequent indorser, and that the case cited of *Ancher* v. Bank of *England*, established that point as to the payee only.

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Lord KENYON ruled with the plaintiffs, he said that the doctrine contended for by the defendant's counsel, was not supported by any case, and that it would clog the circulation of bills of exchange, if by indorsements of this sort, where there might be several, the holder was obliged to prove the hands-writing of the several indorsers: That a bill being payable generally to a payee or his order, when he to whose order only it was payable, by a blank indorsement, sent it into the world, that he meant it should have a general circulation, and any person to whose hands it came *bona fide*, by proving the hand-writing of the payee, entitled himself to sue; that as this gave him a legal title, he might strike out the names of all the intermediate indorsers, whether the indorsements to them were special or not.

The plaintiff had a verdict.

Erskine, *Gibbs* and *Pearce* for the plaintiff.

Law and *Chambre* for the defendant.

Vide *Edie* v. *E. Ind. Comp.* 2 Burr. 1216. *Smallwood* v. *Vernon*, 1 Stra. 478.

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WILSFORD et alt. *against* WOOD.

Tuesday, July 21st.

In an action by several partners for goods sold, if one of them joins in the action, who at the time of the contract was not a partner, but who afterwards becomes such, and by agreement among the partners was to have a share in the profits, from a time preceding the contract, the plaintiffs shall be nonsuited; for the contract must relate to the time of making it, at which time he was not a partner.

THIS was an action for goods sold and delivered. The delivery of the goods was in *April* 1792.

*It appeared in evidence, that in the beginning of the year 1792, the plaintiff *Wilsford*, had carried on business with one partner, but in *August* 1792, a person of the name of *Campion*, had been also admitted as a partner, but by agreement under the articles of co-partnership, he was as to profit and loss, to be deemed a partner from the first of *January* preceding, and he together with *Wilsford* and the other partner joined in the present action, and were the plaintiffs on the record.

The counsel for the defendant, upon this evidence insisted that the plaintiffs should be nonsuited, as the contract proved, was different from that declared on.

Per Lord KENYON. The plaintiffs must be nonsuited; at the time the goods were furnished, *Campion* was not a partner, the agreement that he should be held to be a partner from the

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WILSFORD et alt. *against* WOOD.

first of *January* preceding, only respected the parties themselves, not third persons, nor could they by such agreement give a right of action, which did not subsist at the time of the contract made. In *April* 1792, *Campion* not being a partner, there was no contract with him; and he has therefore improperly joined in the action.

Erskine and *Baldwin* for the plaintiff.

Garrow and *Marryat* for the defendant.

Vide *Leglise* v. *Champante*, 2 Stra. 820. *Graham* v. *Robinson*, 2 T. R. 282.

[184]

THOMSON *against* MILES.

Same day.

In an action for the breach of an agreement respecting the purchase of an house, the declaration need not state the collateral representation made at the time of the sale, such as that the house was in repair, &c. where the action is for a general breach of the agreement.

THIS was an action on the case brought to recover damages for the breach of an agreement to complete the purchase of certain premises, comprising an iron-foundery, dwelling-house, &c. which the defendant had purchased at a public sale.

The particulars of sale described the house, foundery, &c. as being in thorough repair, held under a lease of which forty years were unexpired, with a certain right of cartway for twenty-four years.

The declaration only set out so much of the agreement as respected the purchase of the foundery, house, &c., but stated no part of that respecting its being in repair, or respecting the right of cartway.

Mingay for the defendant objected, that the whole being an entire purchase, under certain particulars comprised in the agreement, that the whole ought to have been set out in the declaration.

Lord KENYON over-ruled the objection: he said that the material part, and upon which the plaintiff's action was grounded, arose on the purchase of the foundery, house, &c. and that the circumstance of its being in repair was a mere collateral matter, and that of the right of way, an easement merely annexed to the house and foundery, and so need not be stated in the declaration.

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It was admitted, that in order to support the present action, it was incumbent on the plaintiff to shew that he could make a good title to the several matters as sold.

When a party, to prove a right of way, or such, produces several deeds by which such way has been granted, he shall not be put to prove such deeds by the subscribing witnesses.

To prove the right of way, the plaintiff produced the deeds by which the right had been granted, and pointed out the clauses by which it was given, and which right had been enjoyed by the plaintiff.

Mingay

Mingay for the defendant objected, that the deeds themselves should first be made evidence, by producing the subscribing witnesses.

Lord KENYON ruled it not to be necessary. He said he would never allow it, that where the question was respecting a title, that the party should be called upon to prove the execution of all the deeds, deducing a long title: that it was never mentioned in the abstract, or expected in making out a title in any case of a purchase, more particularly where possession had accompanied them: he therefore admitted them without proof of the execution.

When a party sells an estate, or any interest, and at the time has no title, or not such as he sells; if he nevertheless obtains such estate or interest at any time before he is called upon, to complete the purchase, it is sufficient; and if an action is brought, shewing that the party had never been called upon, and had at that time a good title, is a sufficient answer to the action.

To prove the duration of the lease, as represented in the particulars of the sale, the lease itself was produced, and it was found that in point of fact there were but thirty-nine years unexpired, though the particular expressed that there were forty; but, by an agreement indorsed on the lease, the lessor had thereby agreed to add one year to the unexpired term, so that there were in fact forty years to come; but this agreement by the lessor was dated after the action brought.

This was objected to as fatal, the term sold not being the true one; and it was strongly insisted on, that the enlargement of the term being made after the action brought could not cure it.

Lord KENYON said, that it had been solemnly adjudged, that if a party sells an estate without having title, but before he is called upon to make a conveyance, by a private act of parliament, gets such an estate as will enable him to make a title, that that is sufficient: that here the plaintiff being enabled to make a title, and the defendant never having applied for it, that he should not be allowed to set up against the plaintiff, a want of title, though the power of making that title was obtained after the action brought; his Lordship therefore ruled, that the evidence offered, was sufficient to support the action.

The agreement by the lessor to allow the year in enlargement of the term, was not by deed.

Mingay objected that it should have been so.

His Lordship ruled, that referring to the lease, it was sufficient without being by deed. [186]

Erskine and *Baldwin* for the plaintiff.

Mingay and *Lawes* for the defendant.

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Saturday, July 24th.

Where a ship is freighted by the month, the months are calendar not lunar ones.

JOLLY *against* YOUNG.

THIS was an action on a charter-party by which the plaintiffs chartered a certain ship, to perform a voyage to *Leghorn* at — *l. per* month.

The plaintiff claimed the freight, for twenty-two months, [187] calculating them as lunar months.

This was resisted, and it was contended that such calculation should always be by calendar months.

Lord KENYON left it to the jury, how the merchants esteemed such contracts.

The jury (a special one) said the calculation was by calendar months, and his Lordship directed them to estimate the damages accordingly.

Erskine and ——— for the plaintiff.

Bower and *Giles* for the defendant.

Tuesday, July 28th.

Where no demand has been made in the testator's life-time for services performed, how far a legacy left shall be taken as against a claim for such services.

LE SAGE *against* COUSSMAKER and Others, Executors.

ASSUMPSIT for work and labour, with the usual counts. The defendants were the executors of one *Vanveyhever*.

The plaintiff was a stock-broker, and in the life-time of the testator, had transacted all his money concerns to a considerable extent; it was also given in evidence, that he had been employed by the testator in several matters, such as keeping his books, translating his letters, &c. and that he was also in the habit of doing for him several acts of attention, and rendering him many services of that nature.

[188] The defendants resisted the plaintiff's demand, on the grounds, that the testator being a man of very great wealth and uncommon parsimony, a foreigner, and without relations, that the several services upon which the plaintiff grounded his action, were gratuitous, and done solely with a view to a legacy on the testator's death.

It was further relied on, that a bill having been filed by the executors, all the creditors of the testator's estate had been called upon under a reference to a Master in the Court of Chancery, to put in their several claims, and that the plaintiff having made his claim, the Master had disallowed it.

Erskine

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LE SAGE *against* COUSSMAKER and others, Executors.

Erskine of counsel for the defendants, then contended, first, that the legacy must be taken as a complete satisfaction; and secondly, that the reference to the Master must be considered as the referring of claims to an arbitrator, and he having awarded nothing to be due to the plaintiff, that it was a complete answer to the case.

The Master's report does not conclude a party from suing at law, for any claim upon which the Master may have decided.

He then gave in evidence the payment of a legacy of 400*l.* to the plaintiff, under the testator's will, and also the Master's report, by which he disallowed the plaintiff's claim against the estate.

Lord KENYON ruled, That neither was an answer to the plaintiff's demand: that a legacy was never deemed a satisfaction for a legal demand, when that demand was unliquidated at the time of the legacy given, nor where it was given before the time when the demand accrued, or the debt was contracted, unless it was expressly said in the will, that it should be a satis- [189] faction; that nothing in this case appeared which could operate as an ademption of the legacy; as to the Master's report, his Lordship said, it established nothing, that the party should never be concluded by it from suing in the regular course of law for his demand, though the Master might think fit to report that nothing was due.

His Lordship added, that the law was well settled, that if the plaintiff had undertaken the several services proved, without any view to a reward, but with a view to a legacy, that he could not set up any demand against the testator's estate, but of that the jury were to decide.

The jury found for the plaintiff 600*l.* damages.

Bower, *Baldwin* and *Giles* for the plaintiff.

Erskine, *Garrow* and *Park* for the defendant.

Vide *Toller's Law of Executors*, 263. *Osborn* v. Governors of *Guy's* Hospital, 2 Stra. 728.

END OF TRINITY TERM, IN THE KING'S BENCH.

1794.

IN THE COMMON PLEAS AT WESTMINSTER, SAME TERM.

KNIGHT *against* CROCKFORD.

An agreement beginning "I, *A.B.*" though not signed by the party, is good within the statute of Frauds.

THIS was an action brought by order of the Court of Chancery, to try the validity of an agreement for the sale of certain premises.

It was brought in the nature of an action on the case, for breach of the special agreement.

The declaration stated, That the defendant by a certain agreement in writing, dated the 15th of *December*, 1791, had agreed with the plaintiff to sell him a certain public-house called the *Rising Sun*, with the appurtenances, situate at ——, for the sum of ——*l.* [setting out the agreement at length.] Plaintiff to take certain fixtures, &c. The declaration then stated mutual promises, and an averment of performance generally on the part of the plaintiff, and that he was willing to accept of the premises upon the terms agreed on, but the defendant refused to sell.

Plea of *Non assumpsit.*

The plaintiff, at the trial, produced a memorandum of the agreement of the above date, beginning "I, *James Crockford*, agree to sell, &c." But signed only by the plaintiff, and witnessed by one *Mills*.

[191] *Mills* was called, and proved, that being present when the plaintiff and the defendant met concerning the sale of the defendant's house, the defendant offered it upon the terms mentioned in the agreement, but the plaintiff, by advice of the witness, took time to consider of it: That a few hours afterwards they all met again at the defendant's house, when the defendant produced the agreement in the form it now appeared in evidence, except that it was not then stamped, nor had the following clause, viz. "That the parties bound themselves to its performance under a penalty of 100*l.*" That the manner in which that clause came to be added was, that at that time the plaintiff approved of the terms, but required the above clause to be added, upon which the defendant wrote it with his own hand, and then the plaintiff subscribed his name to it, and the witness attested it, but the defendant never signed it, otherwise than

than as above stated; after which the plaintiff took it and put it into his pocket.

The plaintiff then proved, that by the direction of the defendant, he had caused drafts of proper conveyances, to be prepared according to the agreement, which he delivered to the defendant's attorney, to be approved of on his behalf, which he had returned, approved: but that afterwards the defendant's attorney being applied to, to appoint a time for the execution of them, said that the defendant could not convey to the plaintiff, as he had sold the premises to another person for more money.

No drafts or deeds were produced in evidence, but these facts were sworn to by the witness, by whom the business had been transacted. [192]

Adair, Serjt. of counsel for the defendant, rested his defence upon several objections to the form of the agreement; to the pleadings and on the defect of evidence—He objected first, That the agreement was void within the statute of frauds, as not being signed by the defendant, as required by the statute, it only beginning "I, *James Crockford*, agree, &c." and not having his name subscribed to it, which he contended the statute required: 2dly, That the paper offered and proved, was not an agreement, for that the terms and formalities produced at the first meeting, were merely proposals in writing, drawn up by the defendant, subject to become an agreement when properly acceded to by both parties, which had not been done, as the defendant never had signed them. 3dly, He objected, that if the judge was of opinion that it was a perfect agreement, the penal clause added, at the second meeting, was a substantive and distinct agreement, and ought to have had an additional stamp, being made at another time. 4thly, He objected to the form of the declaration; upon this he contended, that it might be conceived two ways: 1st, By averring a strict performance by the plaintiff, of all things on his part agreed to be performed. 2dly, A willingness and offer to perform, and a waiver on the part of the defendant. That in the present case, the plaintiff had chosen the first, and had averred, and relied on a strict performance, but had not proved it. That for that purpose he should have shewn deeds ready prepared, and properly tendered for execution to the defendant, and a refusal by him; and a tender of the money by the plaintiff: but that he had not produced any deeds in evidence, so that the defendant's counsel might see that they were proper for him to execute. [193]

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KNIGHT *against* CROCKFORD.

EYRE, Chief Justice, over-ruled all these objections. His Lordship said, first, That the agreement contained a sufficient signing within the statute of frauds, by beginning in the defendant's own hand-writing: "I, *James Crockford*, agree, &c." As to the second, he was of opinion that the instrument was proved to be more than proposals, *i. e.* an absolute agreement, on the defendant's part, subject to the plaintiff's approbation, and by his acceding to it a few hours afterwards, on the defendant's adding the penal clause, it became binding upon both. But if it had appeared that, on being submitted to the plaintiff for acceptance, he had hastily snatched it up, had refused the defendant a copy of it, or if, from other circumstances, fraud in procuring it might have been inferred, the Chief Justice said he would have left it to the jury to say, whether it was intended by the defendant at first to be a valid agreement on his part, or as only containing proposals in writing, subject to future revision. To the third, he said that the whole, under the circumstances stated, was one instrument, and so no new stamp was necessary.

As to the declaration, his Lordship added, that the proof appeared sufficient, for the defendant seemed to have incapacitated
[194] himself from executing the conveyance to the plaintiff by selling the premises to another, which rendered further expense and trouble on the part of the plaintiff unnecessary. To this effect, his Lordship instanced the case of an action brought on a contract of marriage; where one party sues for damages on breach thereof by the other, he must be prepared to prove certain formalities, which, in case the defendant has married another in the mean time, are thereby dispensed with.

Verdict for the plaintiff for the penalty.

But a bill having been filed in the Court of Chancery for a specific performance of this agreement, and that Court having intimated that it would decree as prayed for, if the verdict in this case should establish the agreement as a valid one within the statute of frauds, the Chief Justice said the damages should only be considered as nominal.

Le Blanc, Serjt. and *Barrow* for the plaintiff.

Adair, Serjt. and *Bailey* for the defendant.

Vide *Clark* v. *Wright*, 1 Atk. 12. *Hawkins* v. *Holmes*, 1 P. W. 770. *Wilford* v. *Barclay*, 1 Wils. 118. *Stansfield* v. *Johnson*, ante 101.

KEEN

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KEEN *against* BATSHORE.

[*195]

Where matters of account in dispute are submitted to arbitration, but not by bond, and the arbitrator makes an award, the plaintiff may give the sum awarded in evidence on the common counts in *assumpsit*, without a special count, though the sum has been given in under a judge's order.

ASSUMPSIT for work and labour, with the usual money counts.

Plea of the general issue.

The matters in dispute had been referred to the arbitration of two persons named by the parties, who had awarded a certain sum *to be due to the plaintiff; but no arbitration-bonds having been entered into, the award could not be enforced.

The defendant had taken out a summons for the particulars of the plaintiff's demand; and the plaintiff had under this summons given in, as the particulars of his demand, the sum so awarded, and by that description, and now called one of the arbitrators to prove that he had awarded that sum, which sum so awarded was the whole of the evidence of the plaintiff's demand.

Bond, Serjt. for the defendant objected, that the whole of the demand, as given in under the judge's order, being comprised in that single article, that the plaintiff was confined to evidence of it only, and should have declared specially on it; that not having done so, there was no count in the declaration under which it could be given in evidence, the declaration only containing the common counts.

EYRE, C. J. over-ruled the objection: he said, that as there were no arbitration-bonds, that he should take the transaction respecting the reference as a statement of accounts between the parties, and an admission of the balance due to the plaintiff; that it therefore could be given in evidence under the common counts, and particularly as an account stated.

The plaintiff had a verdict.

Adair, Serjt. and *Th. Walton* for the plaintiff.

Bond, Serjt. for the defendant.

Vide *Slack* v. *Buchanan*, Peake N. P. Cas. 5.

END OF TRINITY TERM.

HOME

1794.

HOME CIRCUIT, SUMMER ASSIZE,

AT MAIDSTONE, *coram* LORD CHIEF JUSTICE LORD KENYON.

Monday, Aug. 11th.

LEITH *against* POST.

Where a deed or other instrument is in the hands of an attorney who was attorney for the party at the time it was executed, but is not his attorney on record, or at the time of the trial, his production of it does not supersede the necessity of calling the subscribing witness, without calling whom it cannot be given in evidence.

ASSUMPSIT for money had and received.

In the course of the cause it became necessary to give in evidence a bill of sale of certain effects which had been executed by the defendant.

Symonds, an attorney, was called by the plaintiff, and produced the bill of sale in question; he was not the subscribing witness, nor was the subscribing witness produced.

Symonds had been attorney for the defendant at the time the bill of sale was executed.

The counsel for the plaintiff insisted that this entitled them to read the bill of sale, without any proof, as coming from the defendant's attorney.

Lord KENYON asked if he was the attorney on the record, or then concerned for the defendant?—He said he was not.

[*197]

**Per* Lord KENYON. If a deed is produced by the attorney for the defendant, the plaintiff is in that case not obliged to prove the execution of it, for the deed being in the hands of the opposite party, it cannot be known by him who the subscribing witnesses were; but this is not the case of a deed produced by the opposite party. The witness, it is true, was attorney for the defendant when the deed was executed, but he is not so now; he therefore does not produce the deed as attorney in the cause. The reason of the rule does not apply; and as the instrument is not proved by the subscribing witness, it cannot be given in evidence.

Pigott and *Lawes* for the plaintiff.

Bond, Serjt. for the defendant.

Vide *Rex* v. *Middleroy*, 4 T. R. 441.

DOE

1794.

Doe ex dem. Orrel *against* Madox.

Tuesday, Aug. 12th.

Registers of marriages solemnized in the *Fleet* are not evidence.

THIS was an action of ejectment for the recovery of lands, claimed by the lessor of the plaintiff under the same common ancestor under whom the defendant also claimed.

In proving the pedigree, it became necessary to give in evidence the marriage of one of the branches of the family: this was done by the production of one of the books containing the *Fleet* register of marriages, in which was a register of the marriage in question.

Lord Kenyon admitted it.

In summing up the evidence in the cause to the jury, his Lordship observed that he had admitted in evidence the register of [198] the *Fleet* marriages, because former Judges had done so; but he desired that his having done so should not be understood as thereby sanctioning their admission, nor should his authority be cited for the purpose in future, as he was of opinion that they were liable to many objections; that their authority was very doubtful; and therefore, as a species of evidence of a suspicious and exceptionable nature, he thought they ought not to be allowed.

This was the fourth time this cause had been down for trial, in all of which the defendant had verdicts.

Bond, Serjt. *Morgan*, and *Marryat* for the plaintiff.

Pigott, *Shepherd*, and *Venner* for the defendant.

Vide *Read* v. *Passer*, post, 213.

Furley ex dem. *Mayor*, &c. of *Canterbury*, *against* Wood.

Same day.

Where a holding is general from *Michaelmas*, the custom of the country, as to whether that shall be deemed *Old* or *New Michaelmas-day*, is admissible evidence.

EJECTMENT for lands in the city of *Canterbury*, held by lease from the corporation.

The notice was dated the 3d of *March* 1793, to quit at *Michaelmas* then next following.

The evidence of the holding was from *Old Michaelmas*, which was the 10th of *October*.

Runnington, Serjt. for the defendant objected to this notice; he contended that the notice to quit should always correspond with the precise day of the determination of the term; that here [199]

it

1794.

FURLEY *against* WOOD.

it was in evidence that the term had commenced on the 10th of *October* (*Old Michaelmas-day*), whereas the notice to quit was general to quit at *Michaelmas*, which must be taken in the common acceptation to quit at *Michaelmas* new style; so that the notice therefore did not correspond with the term.

It was answered by the counsel for the plaintiff, that all the holdings in *Kent* commencing at *Michaelmas*, and all demises to hold from *Michaelmas*, commenced at *Old Michaelmas*, so that the usage and custom of the country always had been to deem holdings such as the present, wherein *Michaelmas* was generally mentioned, as holdings from *Old Michaelmas*, and not from the 29th of *September*; and they offered evidence to this effect.

Lord KENYON said, that in cases of this nature the custom of the country was admissible evidence as to the nature of a holding from *Michaelmas*; and as this was a case of that description, and there seemed to be no dispute as to the custom, he was of opinion that the notice to quit was regular.

Where the lessors of the plaintiff are a corporation, in which case the demise is necessarily stated to be by deed, the deed need not be proved in evidence.

The plaintiffs had declared on a demise from the lessors by deed of the premises in question.

Runnington objected, that the deed should be proved.

Lord KENYON said, that the lessors of the plaintiff being a corporation could only make a lease by deed under the corporation seal, and that this therefore was only the common case of a demise to the plaintiff in ejectment, which was never expected to be proved.

The plaintiff recovered.

Robinson and *Harvey* for the plaintiff.

Runnington, Serjt. for the defendant.

Vide *Roe* ex dem. *Henderson* v. *Charnock*. Peake N. P. Cas. 4.—*Roe* ex dem. *Brown* v. *Co. Litt.* 270. b. n. 1.

CASES

CASES

ARGUED AND RULED

AT

NISI PRIUS,

1794.

IN THE

KING'S BENCH;

IN

MICHAELMAS TERM, 35 GEORGE III.

FIRST SITTING IN TERM AT WESTMINSTER.

WHITE *against* CUYLER.

Nov. 11th.

Where a married woman contracts by deed, without any power of attorney from her husband, for the hire of a servant, the plaintiff may consider the deed as void, and declare on the simple contract against the husband, and in such case the deed is evidence of the contract.

ASSUMPSIT for work and labour, with the usual counts. Plea of the general issue.

The defendant in the year 1789 being governor of *Barbadoes*, and his wife being then about to leave *England* for that island, she engaged the plaintiff to accompany her in the capacity of waiting-maid.

Before the plaintiff was hired, an agreement under seal was entered into between the plaintiff, Mrs. *Cuyler*, and a Mr. *Lowe*, respecting the terms of her service, the wages she was to receive, &c.; Mrs. *Cuyler*, among other things, agreeing to pay for the plaintiff's passage back to *England*, in case she was by ill health obliged to leave the *West Indies*. Mr. *Lowe* had joined in this deed, but there was no contract or covenant of any thing to be by him undertaken or performed.

The declaration was in *assumpsit* to recover the sum which the plaintiff had paid for her passage home, she having been obliged to quit the *West Indies* in consequence of ill health.

The

1794.

WHITE *against* CUYLER.

The agreement was produced in evidence, and appeared to be under the hand and seal of Mrs. *Cuyler* and of Mr. *J. Lowe*.

Garrow objected, that as the instrument offered in evidence appeared to be under seal, that the present action could not be maintained, the declaration being in *assumpsit* on a simple contract.

It was answered by *Erskine* for the plaintiff, that this was the deed of a married woman, and void in law as against the husband, so that the plaintiff could not declare on it as a deed against him; that it was only offered, therefore, as evidence of the terms of the hiring, &c. and the claim for wages arising from service; and her expenses home were to be made out by other evidence corresponding with it, the deed, though void, being good evidence of the contract. [*Doe* ex dem. *Rigge* v. *Bell*, 5 T. R. 471.]

Lord KENYON said he would reserve the point, and therefore suffered the cause to proceed: he said the wife might execute a deed as attorney for the husband.

The plaintiff therefore took a verdict subject to the opinion of the Court.

[202] *Erskine* and *Barrow* for the plaintiff.

Garrow and *Onslow* for the defendant.

In the next *Hilary* term the cause came on to be argued.

The counsel for the defendant relied on their former objection to the form of the action. They contended that the wife might execute a deed as attorney for her husband, and that in the present case she should be deemed so to have executed it; so that the instrument in question must be taken to be *Cuyler* the husband's deed, and consequently that this action was not maintainable.

The Court did not hear the plaintiff's counsel.

And if another person joins in such deed, it does not take away the remedy against the husband to sue him in *assumpsit*.

Lord KENYON said, that if the wife was to be taken as having executed the deed, as attorney for her husband, that that ought to appear: and as to *Lowe*'s having executed it, that there was no agreement or covenant whatever in the deed by which he bound himself to the performance of any thing; but besides that, a collateral engagement by him could not discharge the agreement of the other parties. The Court was therefore of opinion that the action was well brought; and ordered the *postea* to the plaintiff.

Vide S. C. 6 T. R. 176.

BROCK

BROCK *against* COPELAND.

Same day.

In an action on the case for keeping a dog used to bite, if the dog was kept on the defendant's premises, and the injury received in consequence of the plaintiff imprudently going on them, the action cannot be maintained.

THIS was an action on the case, to recover damages for an injury received from the defendant's dog.

The declaration stated, that the defendant knowingly kept a dog used to bite; and then set out the injury received by the plaintiff.

The defendant pleaded Not Guilty.

It was given in evidence that the defendant was a carpenter, and that the dog was kept for the protection of his yard: that he was kept tied up all day, and was at that time very quiet and gentle, but was let loose at night. It was further proved that the plaintiff, who was foreman to the defendant, had gone into the yard after it had been shut up for the night, and the dog let out; at which time the injury happened, the dog having then bit and torn him.

On this evidence Lord KENYON ruled, that the action would not lie. He said that every man had a right to keep a dog for the protection of his yard or house: that the injury which this action was calculated to redress, was where an animal known to be mischievous was permitted to go at large, and the injury therefore arose from the fault of the owner in not securing such animal, so as not to endanger or injure the public: that here the dog had been properly let loose; and the injury had arisen from the plaintiff's own fault, in incautiously going into the de- [204] fendant's yard after it had been shut up.

But where there is either a public way, or the owner of a mischievous animal suffers a way over his close to be used as a public one, if he keeps such animal in his close, he shall answer for any injury any person may sustain from it.

His Lordship added, that in a former case, where in an action against a man for keeping a mischievous bull, that had hurt the plaintiff, it having appeared in evidence that the plaintiff was crossing a field of the defendant's where the bull was kept, and where he had received the injury, the defendant's counsel contended, that the plaintiff having gone there of his own head, and having received the injury from his own fault, that an action would not lie: but that it appearing also in evidence that there was a contest concerning a right of way over this field wherein the bull was kept, and that the defendant had permitted several persons to go over it as an open way, that he had ruled in that case, and the Court of King's Bench had concurred in opinion with him, that the plaintiff having gone into the field, supposing that he had a right to go there, and the defendant having

1794. — BROCK *against* COPELAND.

permitted persons to go there, as over a legal way, that he should not then be allowed to set up in his defence the right of keeping such an animal there as in his own close; but that the action was maintainable.

In the chief case the plaintiff was nonsuited.

Erskine and *Henderson* for the plaintiff.

Garrow for the defendant.

SECOND SITTING AT WESTMINSTER.

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[205]

PAGET et alt. *against* PERCHARD et alt. Sheriffs of *London*.

Monday, Nov. 17th.

If a party who obtains a bill of sale takes possession under it, but suffers the late owner of the goods to interfere or execute any act of ownership, it shall avoid the bill of sale as against a subsequent *bonâ fide* execution.

TRESPASS against the defendants, for taking certain goods under an execution.

The goods had been the property of a Mrs. *Spencer*, who then kept a public-house: the plaintiffs had been her distillers, and claimed under a bill of sale from her.

The defendants had seised under an execution at the suit of another creditor, of the name of *Bayley*.

On the 4th of *April*, Mrs. *Spencer* had given the bill of sale to the plaintiffs; and a person on their account had entered at seven o'clock in the evening of that day, and taken possession. The bill of sale was of all her effects, including all the liquors in the house, as well as the furniture, &c.

The execution was put into the house the next day, at the suit of *Bayley*.

The defence was, that the bill of sale was merely colourable.

It appeared in evidence, that though the person was in possession under the bill of sale, that he had permitted Mrs. *Spencer* to sell liquors in the usual way of her trade, on the evening

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of the 4th of *April*, and to receive the money during that time; and that she had not accounted for it.

The sheriffs had notice of the bill of sale; when the goods were taken by them under the *fieri facias*.

Lord KENYON said, That the allowing Mrs. *Spencer* to appear, as usual, mistress of the house, and to execute acts of ownership after having parted with all her property by the bill of sale, was inconsistent with such situation, and a sufficient

7 evidence

evidence of fraud as against *bonâ fide* executions; he therefore directed a nón-suit. 1794.

PAGET et alt *against* PERCHARD.

Mingay and *Russell* for the plaintiffs.

Garrow and *Morgan* for defendants.

Vide *Edwards* v. *Harben*, 2 T. R. 587. *Langham* v. *Biggs*, 1 Bos. & Pull. 81.

BAYNES *against* SMITH.

Same day.

Wearing apparel, while not in use, is distrainable for rent arrear.

TROVER for a quantity of wearing apparel. The plaintiff had rented furnished lodgings from the defendant, at half-a-guinea *per* week. On the 29th of *March* 1794, eight weeks being then in arrear, the defendant distrained, and took the wearing apparel of the plaintiff and his wife, some part of which was then washing.

The action was brought on the supposition that wearing apparel was not * distrainable for rent.

Lord KENYON ruled, That it clearly was distrainable for rent; [207] and nonsuited the plaintiff.

Mingay and *Shuter* for the plaintiff.

Garrow for the defendant.

Vide *Gorton* v. *Falkner*, 4 T. R. 465.

* The principle upon which it has been deemed that wearing apparel cannot be distrained, is founded on a rule of the common law, in *Co. Lit.* 47. *a*, where it is said, that things in actual use cannot be distrained for rent; but it was ruled by Lord *Kenyon*, in a case of *Bisset* v. *Caldwell*, Sittings after *Hilary* Term 31 *Geo.* III. that where a landlord had distrained the clothes of the plaintiff's wife and children while they were in bed, and which they meant to put on in the morning, and were in the daily habit of wearing, that they were liable to distress for rent, upon the principle that they were not in actual use: his Lordship there observing, that the law as laid down in *Coke Littleton*, proceeded upon the principle, that a distress for rent was but in the nature of a pledge; but that since statute 2 *W.* & *M. cap.* 5, had permitted the party distraining to sell the distress, that that rule of the common law would now receive a different construction; and in that action, which was trespass for taking the wearing apparel, he directed the plaintiff to be nonsuited.

1794.

SECOND SITTING IN TERM AT GUILDHALL.

Tuesday, Dec. 18th.

AMERY *against* ROGERS.

Where there is a joint insurance directed to be made on a ship and cargo, and part only attaches, how the loss is to be estimated.

THIS was an action of *assumpsit*, on a policy of insurance on the ship *Dart*, from St. *Kitts* to *London:* the defendant had underwritten 200*l.*

No question arose concerning the loss; the only doubt was, how far the plaintiff was intitled to recover.

The policy was on the ship and cargo.

The evidence was, That *Amery* the plaintiff, who was the proprietor of the ship and cargo, had written from St. *Kitts*, in the month of *October* 1793, to his agent in *London*, to effect a policy on the ship and cargo to the amount of 5500*l.* calculating the ship at 1500*l.* and the remainder on the cargo. No part of the cargo had ever been taken on board, so that in fact the policy had attached only on the ship.

In estimating the sum which the plaintiff was intitled to recover, the counsel for the defendant contended, that as no part of the policy had ever attached on the cargo, the plaintiff was only intitled to recover such a proportion of the sum which the defendant had underwritten, as the property upon which the policy attached bore to the whole.

Lord KENYON was inclined to be of opinion, That as the whole of the policy of 600*l.* which was all that had been effected on the ship, was less than its value, that the plaintiff was intitled to go for the whole of the sum underwritten by the defendant. But the jury having intimated to his Lordship, that the rule as mentioned by the defendant's counsel, was that adopted in settling policies at *Lloyd*'s Coffee-house, his Lordship assented to their giving their verdict by such mode of calculation.

[209] A question then arose, how far an interest in the ship had been proved to be in the plaintiff, to intitle him to maintain his action.

Lord KENYON ruled, That his having exercised acts of ownership in directing the loading, &c. of the ship, and paying the people employed, was sufficient proof of interest.

Pigott, ——, and *Marryat* for the plaintiff.

Mingay and *Giles* for the defendant.

SAYER

1794.

SAYER *against* KITCHEN.

Same day.

An answer received at the house of the drawee of a bill of exchange that the bill would be taken up when due, does not amount to an acceptance, unless it can be shewn that the answer was given by the drawee, or by his authority.

THIS was an action of *assumpsit*, brought to recover the amount of a bill of exchange, of which the defendant was the acceptor, drawn upon him by one *Holland*; and also a further sum for goods sold and delivered.

The plaintiff was unable to prove the hand-writing of the defendant, subscribed to the bill, by any witness who was acquainted with it; but offered the following, as an admission by him tantamount to proof of his acceptance. This evidence was that of a clerk of the banking-house into which the bill in question had been paid, and who had brought the bill to the defendant's house for acceptance. The defendant was not then at home; but the clerk received for answer, at the house, " that the bill would be taken up when due."

Mingay for the plaintiff contended, that this answer so re- [210] ceived, at the house of the defendant, to a bill, upon which his name appeared as drawee, was a sufficient acknowledgment of the acceptance upon which to charge him.

Lord KENYON ruled, That it alone, without some proof of the defendant's hand-writing, or something to shew that the acknowledgment came from him, was insufficient. The plaintiff having no further evidence to that point, the count on the note was abandoned.

Where notice has been given to produce books if the party calls for them and inspects them, it does not therefore make them evidence for the party whose books they are.

On the count for goods sold, the defence was, That they had been furnished on the account of *Holland*, the drawer of the bill of exchange. The defendant having given notice to the plaintiff to produce his books, now called for them, for the purpose of seeing whether the defendant or *Holland* had been made debtor in the books. The defendant had in truth been made the debtor; and *Mingay* insisted that the defendant's counsel having called for the plaintiff's books, had thereby made them evidence, and that the entries therein respecting the party made debtor, were admissible to go to the jury.

Lord KENYON said, That it did not make them evidence: that if the counsel on one side called for the other's books, and made no use of them, that it was only matter of observation to the counsel on the other side that the entries there were in favour of his client, but did not intitle him to use them as evidence to be offered to the jury.

Mingay

1794.

SAYER *against* KITCHEN.

Mingay and *Baldwin* for the plaintiff.
Garrow for the defendant.

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SITTINGS AFTER TERM AT WESTMINSTER.

Saturday, Nov. 29th.

Those things are to be deemed necessaries, in order to charge an infant, which correspond with his real circumstances, not with his appearance in life.

FORD *against* FOTHERGILL.

ASSUMPSIT to recover the amount of a tailor's bill. Plea of infancy, and replication of necessaries.

The evidence in the case was, That the defendant was a lieutenant in the *Norfolk* militia, and had been introduced to the plaintiff, who was a tailor, by a person of distinction, who then commanded the regiment; in consequence of which he had been induced to give him credit.

He proved the delivery and value of the goods, and there rested his case.

For the defendant it was given in evidence, That he had contracted debts with several other tailors during the same period in which he had contracted the present debt; which debts, to a considerable amount, his father had paid; but it did not appear that *Ford*, the plaintiff, knew of the defendant's employing other tailors at the same time, or of his having contracted any other debts on such account.

[212] *Mingay* for the plaintiff contended, That if a tradesman furnishes clothes, which are *prima facie* necessaries, and these appear to correspond with the situation and appearance in life which an infant makes, that in such a case the infant shall be liable; nor is the tradesman bound to inquire into his transactions or dealings with others.

Bearcroft for the defendant insisted, That the appearance or ostensible situation in life of an infant was not the rule to go by; that the question was, What were his real circumstances? and what were necessaries becoming such circumstances?

Lord KENYON ruled the law to be as stated by the defendant's counsel: that the question of necessaries was a relative fact to be governed by the fortune or circumstances of the infant, and that proof of those circumstances lay on the plaintiff: that a person trusting an infant, did it at his peril: and though it had been stated that a tradesman had no business to inquire into what dealings an infant had with others, that he

was

was of opinion the tradesman was bound to make such inquiry; and if the infant had contracted other debts at the same time, for the same sort of articles for which the action was brought, that such was good evidence to rebut the presumption of necessaries.

1794.

FORD *against* FOTHERGILL.

The jury found a verdict for the plaintiff, against his Lordship's direction.

Mingay and —— for the plaintiff.

Bearcroft and *Shepherd* for the defendant.

Vide *Hands* v. *Slaney*, 8 T.R. 578.

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[213]

READ *against* PASSER.

Tuesday, Dec. 2d.

The register of marriages solemnized in the Fleet, is not evidence.

THIS was an issue directed out of the Court of Chancery. The question for the decision of the Court of King's Bench was, "Whether one *Edward Read* was the heir at law to *Ann Bottom*, his mother, deceased?" This question turned on the fact, of whether a marriage had ever actually taken place between the plaintiff's father and mother, the plaintiff claiming as heir at law to his mother, *Ann Bottom*, who had been last seised; it being contended on the part of the defendant that the plaintiff was illegitimate.

The marriage was stated to have taken place in *January* 1753, which was the year preceding the marriage-act, which passed 25th of *March* 1754.

The counsel for the plaintiff rested their case principally on cohabitation, and on the father and mother's being always considered in the family, and received as man and wife; and brought many witnesses, relations of the family, to prove the fact: and lastly, offered in evidence a register of the marriage from the *Fleet*-books, which they produced, and contended to be evidence, being antecedent to the marriage-act.

On the first witness being called, who was son to the plaintiff's father's brother, to prove the cohabitation and reception as man and wife, *Mingay*, for the defendant, took Lord KENYON's opinion, whether it was not competent for him to ask, if he had ever heard the parties deceased say that they had been actually married? and if so, whether it would not then be incumbent on the plaintiff to bring evidence of the actual marriage? and whether the plaintiff would not be thereby prevented from going into the inferior evidence from cohabitation, reputation, &c. [214]

Lord

1794.

READ *against* PASSER.

* As well since the marriage-act as before cohabitation, reception by the family, &c. are evidence of an actual marriage, though no register is produced.

* Lord KENYON said, That evidence from cohabitation, reception by the party's family as man and wife, was under every circumstance admissible, and *prima facie* evidence of marriage to go to the jury.

[*Vide* the case of *Harvey* v. *Harvey*, 2 *Blackst. Rep.* 877, where cohabitation and evidence from circumstances of acknowledgment was held on a solemn appeal to the delegates to be good evidence of a marriage, even *inter vivos*, without any evidence of the actual solemnization of any ceremony previous to the marriage-act 25th *Geo.* II.]

And his Lordship added, that though the marriage-act had introduced registers of marriages, that registration made no part of the validity of a marriage; it went but in proof of it. And, that now, as well as before the passing of that act, cohabitation, acknowledgment, and reception by the family, was good and admissible evidence of a marriage, though no register whatever was produced.

Garrow then offered in evidence a book containing the registers of the marriages in the *Fleet*, which he stated to be an original register, as evidence of a marriage *de facto* having there taken place between the parties.

[215] Lord KENYON said, That as it often occurred that this evidence was offered in proof of an actual marriage, it was proper to give his decided opinion concerning the evidence of these registers.

He said, that in a case on the Home Circuit last summer, he had admitted such registers in evidence; but though he had not then made up his mind concerning their admissibility, that he then thought them a species of evidence of a very doubtful and dangerous nature, and had in summing up, observed to that effect to the jury*. His Lordship said, that in a late case at the last *Shrewsbury* assizes†, they had been admitted by Mr. Justice HEATH; but notwithstanding his respect for that learned judge's opinion, he thought himself bound to dissent, and to give it as his settled opinion, that they were a species of evidence which ought never to be admitted.

His Lordship said, that he had looked into the books concerning the admissibility of such testimony, and found that they accorded with him: that in a case before Lord HARDWICKE, where a book such as the present was offered in evidence, he

* *Doe ex dem. Orrell* v. *Maddox*, *Maidstone* Sum. Ass. 1794, *ante*.
† *Lloyd* v. *Passingham*, Sum. Ass. *Shrewsbury*, 1794.

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tore the book, and said such evidence should never be admitted in a court of justice. That Lord Chief Justice DE GREY had been of the same opinion.

He cited *Miller* v. *Morris*, 1 *Black. Rep.* 623. With respect to the entries in the books themselves, his Lordship observed, that they could be taken in no other point of view than as pri- [216] vate memoranda, which were not evidence. But that these entries were of less legal authority even than the private memoranda of third persons, inasmuch, as they were made not only by third persons, but by persons who knew while they were doing them that they were illegal, and for which they were liable to punishment by the canons of the church.

His Lordship therefore totally rejected them, as a species of evidence completely inadmissible.

Where a notice has been given to produce a deed, but which notice cannot be proved, the attorney for the other party cannot be called upon to produce it, he having admitted a receipt of the notice.

In the course of the cause, *Garrow* for the plaintiff, proposed to give in evidence a deed which was in possession of the opposite party, and which he had given notice to produce.

Not being able to prove the notice, he called the attorney for the defendant, and asked him if he had not received such a notice to produce the deed. He answered in the affirmative; upon which *Garrow* called upon him to produce it.

Mingay objected to the right in the plaintiff's counsel to call on the defendant's attorney for the production of any instrument under such evidence.

Lord KENYON ruled, that under these circumstances he was not bound to produce it.

Garrow and *Shepherd* for the plaintiff.

Mingay for the defendant.

Vide *May* v. *May*, Bull. N. P. 112. *St. Peter's, Worcester,* v. *Old Swinford*, Bur. Sitt. Cas. 25.

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[217]

JONES *against* BROWN, et alt.

Thursday, Dec. 4th.

In an action for beating the son of the plaintiff, stating him as the servant of the father *per quod servitium amisit*, it is not necessary to shew that the son did any material business for the father; it is sufficient that he lives in his house, and is part of his family.

THE declaration in this case stated, that the defendants made an assault on one *Joshua Jones*, then and still being the son and servant of the plaintiff, and then being employed as the servant of the plaintiff, in and about his business, and then and there beat, &c. him; by reason whereof the said *Joshua* became unable to perform the business of the said plaintiff.

In

1794.

JONES *against* BROWN, et alt.

In the course of the cause it became a question, Whether it was necessary for the plaintiff to shew in evidence that the son, in point of fact, did any service for his father in his business, pursuant to the allegation in the declaration to that effect?

Lord KENYON ruled, that it was sufficient to shew that the son lived in and was part of his father's family, and that it alone would raise a service by implication, which was sufficient to support that allegation, and to maintain the action.

Adam and *Shepherd* for the plaintiff.

Garrow for the defendant.

Vide *Bennett* v. *Allcott*, 2 T. R. 166. *Postlethwaite* v. *Barks*, 3 Burr. 1878.

Same day.

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NASH *against* TURNER.

Where there has been an assignment by deed, it is sufficient to prove the assignment by the subscribing witness, without calling the witness to the original deed.

ASSUMPSIT to recover a sum of money paid for the fixtures belonging to certain premises, which had been sold by the defendant, but without any title.

* The defendant was the original lessee; and the plaintiff claimed the premises, under an assignment from him.

The original lease was produced in evidence; on the back of which the assignment to the plaintiff was indorsed.

The subscribing witness proved the indorsed assignment to have been regularly executed; but there was no witness called to prove the execution of the original deed, which *Mingay* contended to be necessary.

Lord KENYON ruled, that it was sufficient to prove by the subscribing witness the execution of the assignment; for the assignment having adopted the original deed in all its parts, it became as one deed, and proof of it was therefore sufficient for the whole.

Garrow and *Marryat* for the plaintiff.

Mingay and *Baldwin* for the defendant.

Friday, Dec. 5th.

DICKINSON *against* BROWN, et alt.

TRESPASS *vi et armis* for breaking and entering the plaintiff's house on the 30th day of *October*, 1793, and assaulting and falsely imprisoning him.

Qu. If the putative father of a bastard child is taken up under a warrant, and brought before a magistrate in order to make him find sureties to indemnify the parish, and is let go on promise to find such,—whether in case he neglects to find such surety, he can be again taken up under the same warrant?

Plea

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DICKINSON *against* BROWN, et alt.

Plea of Not Guilty, and a justification that the defendants had * entered by virtue of a warrant from a justice of peace to apprehend the plaintiff, as the putative father of a bastard child.

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† There was a new assignment of the offence, as done on the 17th day of *January* 1794, in order to fix the offence to that day.

† Vide these cases, vol. I. fol. 28.

The facts appearing in evidence were, that the plaintiff having been charged as the father of a bastard child in the beginning of the month of *September*, 1793, a warrant issued, directed to the defendants to take him upon that charge, in order to make an order of filiation on him.

On that warrant he was apprehended and brought before a magistrate, when the parish-officers being content to liberate him on his giving security to indemnify the parish, it had been proposed to enter into a bond himself, with two sureties, to indemnify the parish: a bond was prepared and executed at that time by him and one surety only. At the time he was discharged, two guineas were claimed by the vestry-clerk as his fees; for which the plaintiff gave his note two months after date.

The note not being paid when due, and some time having elapsed from that period, the plaintiff was on the 17th day of *January* following taken into custody by the four defendants; and being brought before a justice of peace, the defendants produced as their authority for arresting him, the warrant which had been granted in the *September* preceding.

It appeared, that in point of fact, the bond of indemnity to the parish, had never been executed by the second surety, as had been proposed; and the pretext for the second arrest, set up by the defendants, was, that they had taken the plaintiff into custody, under the first warrant, for the purpose of compelling him to find the additional surety in the bond, as he had at first proposed, and at which time he had consented that the first warrant should remain in force till the bond was executed by the second surety.

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The counsel for the plaintiff contended that the statute 18 *Eliz.* having given justices of peace power to issue their warrant to apprehend the putative father of a bastard child, and to make an order thereon, and the parish having agreed to accept the bond, that the warrant was *functus officio* when the party was brought before the justice, it having issued only for the purpose of bringing the party before the justice to answer the complaint,

and

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DICKINSON *against* BROWN, et alt.

and to abide his adjudication: that the warrant therefore could be no justification of the second arrest.

Lord KENYON ruled, that the warrant being for the purpose of bringing the party before the justice, in order to compel him to indemnify the parish, that till that purpose was completed, the warrant continued in force, and would so continue for any indefinite time, until the parish had obtained that indemnity which was the object of their original complaint. That in this case it appeared, that the object of the original arrest had not been performed, as the plaintiff had not found two sureties, as he had undertaken, himself and one surety only having executed
[221] the bond; and that the second arrest was therefore justified by the warrant. His Lordship therefore directed the jury to find for the defendant; which they did.

Mingay, the Common Serjeant, and *Espinasse* for the plaintiff.

Garrow and *Shepherd* for the defendant.

In the next term *Espinasse* moved for a new trial, and 2 *Hawk. P. C.* 130, § 9, was cited to shew that the warrant was after the first arrest *functus officio*; and that the second arrest made in this case was therefore contrary to law.

The Court of King's Bench refused the rule: but it appeared to be rather on the ground of the plaintiff's having consented that the warrant should remain in force until the second surety to the parish was perfected, than as holding the second arrest under the warrant to be legal.

Vide *Mayhew* v. *Hill*, 8 T. R. 110.

NELSON *against* GARFORTH.

Same day.

In an action by one attorney against another for agency business, a bill need not be delivered signed, under stat. 2 *Geo.* 2. *c.* 23.

ASSUMPSIT by the plaintiff, who was an attorney living in *Westmoreland*, to recover from the defendant a sum of money due to him for agency, in the prosecuting of several causes in which the defendant had been concerned as attorney.

Plea of *non-assumpsit.*

No bill had been delivered under stat. 2 *Geo.* 2. *c.* 23, signed by the plaintiff, which the defendant's counsel objected was
[222] necessary, the statute being in general terms, and there being no reason for dispensing with it in one case more than another.

Lord KENYON ruled, that where the action was by an attorney for business done, as agent to another attorney, that the plaintiff

plaintiff was not under the statute obliged to deliver a bill signed, as where he delivered it to a client.

1794.

NELSON *against* GARFORTH.

Bearcroft and *Shepherd* for the plaintiff.

Mingay for the defendant.

Vide *Ford* v. *Maxwell*, H. Bl. 519, & post 120.

SNELL *against* RICE.

Same day.

Where an interlocutory judgment has been signed and set aside on terms that the defendant shall not plead or give coverture in evidence,—the defendant cannot give a real marriage in evidence, or prove that the goods were furnished on the credit of the husband.

ASSUMPSIT for goods sold and delivered, and work and labour.

Plea of *non-assumpsit.*

The plaintiff having in the course of the preceding term signed judgment against the defendant for want of a plea, the Court had on application set that judgment aside; but it having been suggested that the defendant meant to set up coverture, and some other matters in defence, which did not go to the merits, in case she was let in to try, the Court in setting the judgment aside had imposed terms on her; one of which was, "that she should neither plead her coverture, nor give it in evidence, in bar of the plaintiff's action."

The plaintiff proved the sale and delivery of the goods.

Mingay, of counsel for the defendant, offered to go into evidence to prove, that in point of fact the defendant was really married; contending that the meaning of that part of the rule of Court, whereby the defendant was prevented giving evidence of coverture, did not mean to exclude her from a *bonâ fide* defence of real coverture, it only meant to prevent her from setting up a fraudulent or pretended marriage, or other such defence as did not go to the merits. At all events, he contended, that without charging the husband "*eo nomine*," that he might be admitted to shew that the goods were furnished, and the work done on his credit, and not on the credit of the defendant. [223]

Lord KENYON said, that to admit this evidence would be in effect to defeat the rule of Court. That the rule meant to confine the defendant to dispute only the demand, and to prevent her from taking any such collateral defence, and thereby to exclude any question as to coverture, in whatever shape it might arise, as such was a collateral defence; neither could the defendant go into evidence to charge the husband, as to allow the defendant to go into evidence that a certain person, not describing him as the defendant's husband, was liable, was in fact admitting evidence of coverture,

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SNELL *against* RICE.

coverture, and a clear evasion of the rule; and so could not be admitted.—His Lordship therefore rejected the whole of the evidence; and the plaintiff recovered.

Shepherd and *Lawes* for the plaintiff.

Mingay for the defendant.

[224]

Same day.

FEIZE *against* RANDALL.

Where a creditor agrees to accept a composition for his debt and executes a deed, whereby he is to receive the payment of his composition by notes at different dates; if the creditor prevails on his debtor to give these notes either at a shorter date than those given to others, or procures a surety to join with him for their payment, such notes are not void in law.

THIS was an action of *assumpsit* against the defendant, as acceptor of a bill of exchange.

Plea of the general issue *non-assumpsit.*

The defence relied on, on the part of the defendant, was, that the bill was void, as having been given under the following circumstances:—

The defendant was the father-in-law of a person of the name of *M'Donough.* In the year 1792 *M'Donough* became insolvent, and his effects were assigned to one *Morley*, in trust for his creditors, who had agreed to take a composition of fifteen shillings in the pound; ten shillings in the pound to be paid by bills of exchange, drawn by *M'Donough,* and accepted by *Randall* the defendant; one third payable within six months, one third within twelve months, and the remaining third within eighteen months; the remaining five shillings to be secured by notes of hand of *M'Donough* himself, payable in two years.

It was then stated, that the plaintiff refused to sign the composition-deed, until *M'Donough* got for him the defendant's acceptance for the whole fifteen shillings in the pound, by bills at six, twelve, eighteen, and twenty-four months; which bills were made payable to *Morley*, and by him indorsed, and this, independent of the note for five shillings in the pound, to be given by *M'Donough* himself; and upon one of the bills the present action was brought.

[225]

Upon this case being made out in evidence, *Mingay*, of counsel for the defendant, contended, that the bills given under such circumstances were void; he cited the case of *Cockshot* v. *Bennet*, 2 *Term Rep.* 763, and argued, that on the authority of that case and other subsequent decisions in which it had been recognized, that a creditor who agrees to take a composition from his debtor, cannot vary in any respect the security which is given to the bulk of the creditors; as for example, by procuring another person to join in that form of security given to the other creditors, or by shortening the time within which the composition was to be paid;

for

for such was a fraud on the other creditors, who had a right to insist on the same terms; and he therefore insisted that a security given under such circumstances was void. 1794.

FRISE *against* RANDALL.

Lord KENYON said, that the cases had only gone the length of deciding, that where a creditor procures from his debtor a security for the payment of a sum beyond that secured to the other creditors, that such was void; but that the security so taken for the overplus only was void, not that for the composition itself. But his Lordship added, that he was of opinion that altering the mode of payment, or procuring another to join in the security, did not seem to come within the principle upon which the other cases had been decided, inasmuch as the debtor was not charged with the payment of any greater sum than that reserved by the composition-deed, nor was any additional burthen thereby imposed on him. His lordship therefore ruled, that as this action was brought on one of the notes, part of the fifteen shillings in the pound, that the note was good in law, and the plaintiff intitled to recover. [226]

Garrow and *Wigley* for the plaintiff.

Mingay and *Shepherd* for the defendant.

In the next term a new trial was moved for, on the grounds of a supposed misdirection of the Judge. But the Court of King's Bench agreed in opinion with his Lordship, and refused the rule. 6 T. R. 146.

Vide *Jackson* v. *Duchaire*, 3 T. R. 551. *Sumner* v. *Brady*, 1 H. Bl. 647. *Jackson* v. *Lomas*, 4 T. R. 166.

The KING on the Prosecution of SERMON *against* LORD ABINGDON.

Saturday, Dec. 6th.

If a member of parliament publish in the newspapers his speech as delivered in parliament, and it contains charges of a slanderous nature against an individual, an information will lie for a libel; though had the words been merely delivered in parliament, they would be dispunishable in the Courts at *Westminster*.

THIS was an information filed by leave of the Court against the defendant for a libel.

The libel complained of was a paragraph in the public newspapers, stated to be part of a speech delivered by Lord *Abingdon* in the House of Lords.

The circumstances under which it had been given to the world as they appeared in evidence were, that Lord *Abingdon* having in the House of Lords given notice of his intention to bring in a bill the ensuing sessions of Parliament, to regulate the practice of attornies, had in the course of his speech mentioned his having employed Mr. *Sermon* of *Gray's Inn* as his attorney, and after much

invective,

1794.

The KING *against* Lord ABINGDON.

invective, charged him with improper conduct in his profession, with pettyfogging practices, and other matters highly injurious to the character of Mr. *Sermon*. This speech his Lordship read in the House of Lords from a written paper; which paper he had, at his own expense, sent and had printed in several of the public papers.

This trial exhibited the novel spectacle in *Westminster Hall* of a peer, unassisted by counsel or attorney, appearing to plead his own cause.

[227] His Lordship admitted the writing and publishing of the paper charged in the information, but contended that it was not a libel, inasmuch as the several matters charged in it were true. But to substantiate his allegations against Mr. *Sermon*, called no witnesses, nor adduced any evidence whatever.

In the beginning of his speech his Lordship stated it to be the privilege of peers, situated as he was, to sit covered in court, and have a place assigned to them. He relied on only one matter of law, namely, that as the law and custom of Parliament allows a member to state in the House any facts or matters, however they might reflect on an individual, or charge him with any crimes or offences whatsoever, and such was dispunishable by the law of Parliament, his Lordship from thence contended, that he had a right to print what he had a right to deliver, without punishment or animadversion.

In a criminal prosecution where the defendant calls no witnesses, the counsel for the prosecution are not entitled to a reply.

When his Lordship sat down, *Erskine*, of counsel for the prosecution, rose to reply.

Lord KENYON observed, that as the defendant had called no witnesses, he thought it irregular in the counsel for the prosecution to reply.

*It was answered, that it was a privilege of the counsel for the prosecution, and said to have been often allowed on circuit.

[*228] Lord KENYON said, that though the Attorney-General might be entitled to it, it was a privilege he thought no other counsel for the prosecution ought to have: that he had never claimed it while a counsel, and holding a high office under the crown; and that he would not now make a precedent of what he disapproved.

In a criminal prosecution against a peer in K.B. he has no right to sit covered, or to have a place assigned to him.

The Chief Justice then proceeded to observe, that with respect to the privilege claimed by Lord *Abingdon*, in the present case none such existed. That as to the words in question, had they been spoken in the House of Lords, and confined to its walls, that Court would have no jurisdiction to call his Lordship before them, to answer for them as an offence; but that in the present case,

1794.

The King against Lord Abingdon.

case, the offence was the publication under his authority and sanction, and at his expense: That a member of Parliament had certainly a right to publish his speech, but that speech should not be made the vehicle of slander against any individual; if it was, it was a libel: That in order to constitute a libel, the mind must be in fault, and shew a malicious intention to defame, for, if published inadvertently, it would not be a libel; but where a libellous publication appeared unexplained by any evidence, the jury should judge from the overt act, and where the publication contained a charge slanderous in its nature, should from thence infer that the intention was malicious.

The jury found his Lordship guilty. [229]

In criminal prosecutions the judge cannot certify for the costs of a special jury.

The jury was a special one, and struck by the prosecutor. *Erskine* asked for the Judge's certificate. Lord Kenyon said, that in a criminal case of this nature he could not certify so as to give the costs.

Erskine, *Garrow*, *Chambre*, and *Gaselee* for the prosecution.

In the next term Lord *Abingdon* was brought up to receive the judgment of the Court, which was, that he should be imprisoned for three months, pay a fine of 100*l.*, and find security for his good behaviour.

Vide *Rex* v. *Bate* and *Haswell*, Dougl. 572.

Neale ex dem. Leroux *against* Parkin and Lambert.

Same day.

[*230]

On a demise of a piece of ground on which a tenant had built, if it corresponds with the abuttals, though not with the measured distance as stated in the lease, and the lessor sees the building going on without objecting to it, he shall not afterwards be allowed to claim the overplus above the measured distance, on the footing of an encroachment.

EJECTMENT brought to recover a piece of ground situated at *Sommers Town* in the county of *Middlesex.*

The case in evidence was, that *Leroux*, the lessor of the plaintiff, being possessed of a large piece of ground, had let the same out on building leases in different lots, and had demised to one *Brydges* the part described in the lease by proper abuttals, and containing (among other parts of the description) from east to west 59 feet, *more or less.*

Upon this demise the tenant erected an house, but had in fact covered 62 feet and a half; but which space, though not corresponding * with the measurement, corresponded with the abuttals as set out in the lease.

To recover this space of three feet and a half, being so much

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NEALE *against* PARKIN and LAMBERT.

above the 59 feet as described in the lease, was the object of the present ejectment.

On the part of the defendants it was given in evidence, that *Leroux* the lessor lived in the neighbourhood of the premises: that he had marked and measured out the ground on the original demise to *Brydges* before any building was erected, and saw almost daily the work as it proceeded, without making any objection whatever on account of the supposed incroachment: this, on the part of the defendant, was urged as a waiver of any supposed right he had to claim the part so built upon; but they contended that the ground covered corresponded with the abuttals, and so passed by the demise, though the measured distance might not correspond with that stated in the lease.

Lord KENYON ruled, that the words "more or less" in the lease being indeterminate, and the space covered in fact corresponding with the abuttals, that the tenant had a fair title to insist that it was meant that so much should pass by the demise; but as it had been proved in the present case that the lessor had resided in the neighbourhood, and saw the daily progress of the work, that he should not be allowed to set up this as an incroachment; but at all events it should be left to the jury from thence to infer his acquiescence.

The jury found for the defendants.

[231] *Mingay* and *Sellon* for the plaintiff.

Garrow and *Russell* for the defendants.

SMITH *against* KENDAL, Executor.

A note payable to *A. B.* without the words "or order," is a promissory note within the statute.

THIS was an action of *assumpsit* against the defendant as executor of one *Leonard Askew* deceased, and was tried at the sittings after the last term.

It was brought to recover the amount of a note given by the testator to *Smith* the plaintiff.

The declaration contained no count on the note itself, but only the common ones, for money paid, laid out, and expended, money had and received, and on an account stated.

The defendant pleaded *non assumpsit infra sex annos;* and there was a replication that the plaintiff sued out a *latitat* on the 26th of *September* 1793, and that the cause of action accrued within six years before that time, upon which issue was joined.

The

1794.

SMITH *against* KENDAL.

The plaintiff at the trial produced the note in evidence, which was in the following words:—

"*Bridgefield*, 25*th June* 1787.

"Three months after date I promise to pay Mr. *Smith*, cur-"rier, *Cimester's Alley*, *London*, forty pounds, value received, in "trust for Mrs. *Elizabeth Thompson*; as witness my hand,

"*Leonard Askew*."

For the defendant it was contended, that it appeared in evidence that the cause of action accrued on the 25th of *September* 1787, which was three months after the date of the note, and that of course the six years expired on the 25th *September* 1793; and the *latitat* not being sued out till the 26th of *September*, that the statute of limitations had then attached on the demand. [232]

For the plaintiff it was answered, that the note in question was a promissory note within the statute, and therefore, under the authority of the case of *Brown* v. *Harraden*, 4 *Term Rep.* 148., entitled to three days of grace; so that in fact the statute of limitations could not attach till the 28th of *September*, which included the three days of grace, and the writ was sued out on the 26th.

The counsel for the defendant replied, that the note offered in evidence was not a promissory note within the statute, the words "or order" being wanting, which words they contended to be essential; that it was therefore only evidence of a debt due on the 25th of *September* 1787, and which of course was barred at the expiration of the six years, that was, on the 25th of *September* 1793.

Several authorities were cited on both sides.

Lord KENYON said, that as there seemed to be authorities on both sides, it was proper that it should come before the Court of King's Bench, and therefore allowed a verdict to be taken for the defendant, with leave for the plaintiff to move to set it aside, and to enter up a verdict for him, if the Court were of opinion that he was entitled to recover. [233]

In the next term it was moved accordingly; and for the plaintiff were cited *Chadwick* v. *Allen*, 1 *Strange*, 706; *Cramlington* v. *Evans*, 1 *Show.* 4.; *Moore* v. *Paine*, *Cas. Temp. Hardwicke*, 288.; *Comyn's Dig.* tit. *Merchant*, fol. 240.; *Lewis* v. *Orde*, *Cunningham on Bills of Exchange*, 113.

For the defendant were cited *Jocelyn* v. *Laserre*, 11 *Mod.* 316.; *Banbury* v. *Lissett*, 2 *Stra.* 1211., and *Dawkes* v. Lord *Deloraine*, 3 *Wils.* 207.

The

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The Court took time to look into the authorities, when Lord KENYON delivered the opinion of the Court, that the note was a promissory note within the statute, and cited *Burchell* v. *Slocock*, 2 Ld. *Raym.* 1541. as in point, and therefore ordered the verdict to be entered up for the plaintiff.

Erskine and *Henderson* for the plaintiff.

Garrow and *Bailey* for the defendant.

SITTINGS AFTER TERM AT GUILDHALL.

Wednesday, Dec. 10th.

BOURDILLON *against* DALTON et alt.

[*234]

When a bankrupt holds under a lease, rendering rent, the assignees are not liable for rent becoming due after the bankruptcy, if they have never taken possession of the premises occupied by the bankrupt.

THIS was an action of covenant brought against the defendants as assignees of *Bell*, a bankrupt, to recover from them a sum of 48*l.* for three quarters' rent of certain premises, of which **Bell* the bankrupt had been in possession when he became a bankrupt.

In the month of *June* 1789, *Almon* being possessed of the premises under a lease for 42 years, made an under-lease of them to one *Downes* for 21 years, reserving rent.

In the year 1790, under an execution against *Downes*, the sheriff sold the lease to *Gilman*, who sold to *Bell*; and he was in possession under the lease at the time of his bankruptcy.

Bourdillon, the plaintiff in the action, had purchased *Almon*'s interest, and of course became entitled to the rent reserved to *Almon*, as possessed of the reversion.

The question was, Whether the bankrupt, having been in possession under a lease rendering rent, and which had been assigned under his commission to the defendants as his assignees, they as such were liable for the rent accrued since the bankruptcy?

Bower, of counsel for the defendants, said they had never been in possession, and that they could not therefore be charged as assignees.

Per Lord KENYON. The assignees certainly take this term under the assignment; but if it be what the civil law calls "*damnosa hæreditas*," an interest producing nothing to the bankrupt

[235] estate, they may abandon it. An assignee can only be charged by virtue of possession; there is no proof that the defendants ever took possession of the premises disposed of in this lease; and

as

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BOURDILLON *against* DALTON et alt.

as they are not compelled to take it in their character of assignees, the action cannot be maintained against them.

The plaintiff was nonsuited.

Mingay and *Bailey* for the plaintiff.

Bower for the defendants.

Vide *Eaton* v. *Jaques*, Dougl. 438.

BULLING *against* FROST.

Same day.

Money won fairly at play, if under 10*l.* is recoverable in an action of *assumpsit.*

ASSUMPSIT to recover the sum of 3*l.* 10*s.* for money won at play.

It appeared in evidence that the plaintiff and the defendant played at cards at the game of all-fours, and that the plaintiff won from the defendant the sum stated in the declaration.

The play appeared to be fair, and the sums won and lost at the sitting never amounted to 10*l.*

Lord KENYON said, he had never before known an action of this sort brought; but as the play was fair, and under 10*l.*, that under the statute 9 *Ann. c.* 14. such an action might be maintained; and therefore directed the jury, if they believed the plaintiff's witnesses, to find a verdict for him, which they did.

Garrow and *Baldwin* for the plaintiff.

Mingay and *Lawes* for the defendant.

Vide *Barjeau* v. *Walmsley*, 2 Stra. 1249; *Robinson* v. *Bland*, 2 Burr. 1078; *Wittenhall* v. *Wood*, ante, 18.

[236]

BUTLER *against* RHODES.

Thursday, Dec. 11th.

When a creditor agrees to take a composition from his debtor, on the faith of which the debtor executes a deed of assignment of all his property to a trustee for the benefit of his creditors, such creditor shall not be allowed, by refusing to execute such deed, to sue his debtor for the whole of his demand.

ASSUMPSIT for goods sold and delivered.

Plea of the general issue.

The plaintiff proved the delivery of the goods; which was the whole of his case.

Bearcroft, of counsel for the defendant, stated his defence to be, that the defendant's affairs having become embarrassed, he had proposed to his creditors to pay them a composition of 10*s.* in the pound, and for that purpose, to execute an assignment of all his effects to trustees, for their benefit. That the plaintiff, among others, having been applied to, had consented to accept the composition, and had ordered a draft of the deed of assign-

ment

1794. — BUTLER *against* RHODES.

ment to be sent to his attorney for his perusal, which had been done; and his attorney had accordingly perused and approved it on his behalf: that in consequence of this supposed acquiescence of the plaintiff, the deed had been prepared and executed by the defendant, who thereby had assigned to the trustees all his effects for the benefit of his creditors, who had consented to receive a composition; but that notwithstanding the plaintiff had so given his assent as before stated, he had refused to execute the deed, and now had brought this action to recover the whole of his demand.

[237] These facts were proved; and the draft as approved by the plaintiff's attorney, and the deed, were given in evidence.

Lord KENYON ruled, That this evidence was a complete answer to the plaintiff's action—he said the principle upon which the action could not be maintained was, that in consequence of this act of the plaintiff's, the defendant had parted with all his property, and the other creditors had been induced to execute the deed: that this was putting the defendant into a very aukward situation, as by assigning all his property he was committing an act of bankruptcy: that it therefore never should be allowed to the plaintiff to recede from what he had undertaken, and to evade the effect of the composition, by a refusal to execute the deed which had been prepared with his consent. He therefore directed the jury to find for the defendant.

Garrow and *Parke* for the plaintiff.

Bearcroft for the defendant.

Vide *Cooling* v. *Noyes*, 6 T. R. 263.

Friday, *Dec.* 12th.

[*238]

M'MASTERS *against* SHOOLBRED.

Where a ship insured had been captured and brought into a neutral port, and sold by the captors, and the captain bought her for the benefit of the owners, they shall only be entitled to recover on a policy the sum paid by the captain, and what may be expended in her outfit, and cannot recover for a total loss.

ASSUMPSIT on a policy of insurance.

The insurance was on a ship called the *Four Brothers*, to commence from the 17th of *March*, 1793, for six months, from any port.—The ship valued at 1000*l*.

It was proved that the ship sailed from *New Brunswick*, with a cargo of fish for *Barbadoes*, and was captured by the *Ambuscade* * *French* frigate, and carried into *Charlestown*, in *North America*, where she remained upwards of a month, and was then sold by authority of the *French* consul there, as a prize, by public vendue, and was purchased by the captain (who had been ex-

changed)

changed) for 380*l.* on account of the owners. In addition to this sum so paid for the vessel, 230*l.* was paid by the captain, after he had purchased her, for necessary repairs at *Charlestown*, and for fitting her out again for a voyage: after which she sailed for *Jamaica*.

The defendants, the insurers, had paid 60*l.* *per cent.* into court, as for an average loss.

The plaintiff contended, that the ship having been captured, and sold by the captors, after being a month in their possession, that it was a total loss, for which he was entitled to recover.

For the defendants, the underwriters, it was urged, that the captain was to be considered as the agent of the insured, and as purchasing the property insured for their benefit: that having obtained that property by his act, it was to be considered as if no capture had taken place, but the ship had sustained a certain loss, which the underwriters were bound to make good under the policy: that this loss consisted of the 380*l.* paid, and so much of the 230*l.* as was within the policy; which loss they calculated at 60*l.* *per cent.* and which they had paid into court.

Lord KENYON said, it was impossible to make this more than an average loss: that a policy of insurance was a contract of indemnity, to which, and which only, the insured had a right to [239] look: this was the language of *Roccius*, and its principle had been adopted in every decision on the subject; that it had been decided, that if a ship had been sunk and weighed up again, if it was restored to the owners they had only a right to go for an average loss.—Such also was the case of ransoms; that in the present case, the captain was to be considered as the agent for the owners, as recovering so much property on their account, and that they had therefore a right to recover only so much as was the amount of the injury their property had sustained, which was an average loss; and the only question would be for the jury to calculate, Whether the 60*l.* *per cent.* paid into court, covered the whole of the loss the insured had sustained or not?

It was admitted by his Lordship and the counsel, That when the ship had been captured and carried into port in the enemy's possession, the insured might then have abandoned it, and so have made it a total loss: and the counsel for the plaintiff attempted to make out in evidence, that the insured had offered to do so.—But it appeared to be an offer to abandon, on terms of the defendants paying certain bills, which they not thinking themselves

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themselves liable to pay, had refused. Upon which his Lordship added, that not having abandoned in the first instance, but having recovered the ship, they were bound to go for an average loss only.

The verdict therefore was taken, subject to calculation, whether the 60*l. per cent.* paid into court was sufficient to cover the whole loss, taking it to be an average loss only, the counsel for the plaintiff asserting that it amounted to more than 60*l. per cent.*

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Erskine and *Baldwin* for the plaintiff.

Bower and *Garrow* for the defendant.

Vide *Furneaux* v. *Bradley*, Park Ins. 3 Ed. 166.

Same day.

HOLST *against* POWNAL and SPENCER.

Where a cargo is consigned and before the ship's arrival, the consignee becomes a bankrupt; the arrival of the ship in the port where she is taken possession of by the assignees, but from whence she is ordered out to perform quarantine, is not such a completion of the voyage as shall vest the property in the assignees; but the consignor may still consider the goods as *in transitu*, and stop them while the vessel is performing quarantine.

TROVER for a cargo of fruit.

The plaintiff was a merchant living at *Leghorn*. The defendants were the assignees of *Dutton* and Co. of *Liverpool*, who were bankrupts.

On the 26th of *September*, 1792, *Dutton* and Co. gave the plaintiff an order to charter on their account a vessel for *Liverpool*, with a cargo of fruit.

The plaintiff accordingly chartered the ship *Favourite*, with the cargo in question, according to *Dutton* and Co.'s directions.

The captain signed three bills of lading as usual, one of which was sent to *Dutton* and Company.

In the month of *March*, 1793, which was before the arrival of the vessel at *Liverpool*, the house of *Dutton* and Co. stopped payment, and in the same month were declared bankrupts.

The plaintiff having heard of the circumstance of their stopping payment, sent one of the bills of lading to *Staples* and Co. of *London*, who authorized a Mr. *Ellames* of *Liverpool*, as agent to the plaintiff, to stop the cargo before it was delivered to *Dutton* and Co. under the first bill of lading.

On the 9th of *June* following, the ship arrived at *Liverpool*; but it being discovered that she should have performed quarantine, she was the same evening ordered back to a place called *Hoylake*, for that purpose.

On the day the ship entered the port of *Liverpool* (9th of *June*) *Spencer* one of the defendants, as assignee of *Dutton* and Co.'s estate, went on board her and claimed the cargo as belonging

longing to *Dutton* and Co.'s estate, opened some of the chests of oranges, and put two persons on board, who continued alternately there till the 18th, when the quarantine was ended, with a view of keeping possession of the cargo on account of the bankrupt estate.

[241] On the 17th of *June*, while the vessel was performing quarantine, *Ellames*, as agent and attorney for the plaintiff, served a notice of *Dutton* and Co.'s bankruptcy on the captain of the vessel, and claimed the goods on behalf of the plaintiff, at the same time offering him an indemnity.

Similar notice was served on the defendants.

On the 18th of *June* the vessel came into harbour, and on the 19th broke bulk, on which day a claim was again made by *Ellames*, and an indemnity offered; but the captain delivered the cargo to the defendants; to recover which the present action was brought.

The counsel for the defendants rested their defence on the case of *Ellis* v. *Hunt*, 3 *Term Rep.* 464. They contended that the principal's right to stop *in transitu* was completely at an end [242] when the consignee had got possession by any means of the goods consigned: that the consignee might have met the vessel at sea on her voyage, and have taken possession by virtue of the first bill of lading, which possession they contended would be complete to divest any right the consignor might have to stop the goods *in transitu*: that in the present case there could be no question on that head, as the assignees had taken possession on the 9th of *June*; whereas the notice from the consignor was not given until the 17th; at which time a complete property was vested in the assignees, by virtue of their possession.

Lord KENYON was of opinion, that this was a stopping *in transitu* sufficient to maintain the action: his Lordship said, that in order to give the consignee a right to claim by virtue of possession, it should be a possession obtained by the consignees, on the completion of the voyage: that the case put by Mr. *Erskine*, that the consignee had a right to go out to sea to meet the ship, could not be supported, as it might go the length of saying that the consignee might meet the vessel coming out of the port from whence she had been consigned, and that that should divest the property out of the consignor, and vest it in himself, which was a position not to be supported, as there would be then no possibility of any stoppage *in transitu* at all. That in the present case the voyage was not completed till she

had

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had performed quarantine, till which time she was *in transitu*; and as the plaintiff's agent had given notice, *and claimed the cargo before the completion of the voyage, he was of opinion that the plaintiff had stopped the goods time enough to prevent the property from vesting in the assignees—but on the application of the defendant's counsel, his Lordship saved the point.

Bearcroft and *Lawes* for the plaintiff.

Erskine and *Wood* for the defendant.

In the next term a new trial was moved for on the matter of law as ruled in the case by Lord KENYON; but the Court of King's Bench concurred in opinion with his Lordship, and refused a rule to shew cause. The verdict was therefore entered up for the plaintiff.

Vide *Ellis* v. *Hunt*, 3 T. R. 464. *Lickbarrow* v. *Mason*, 2 T. R. 63. *Hodson* v. *Loy*, 7 T. R. 440. *Owenson* v. *Moss*, 7 T. R. 64. *Hervy* v. *Haywood*, 2 H. Black. 504.

ROBINSON *against* DRYBROUGH.

Where any instrument is by law required to be stamped, it is not sufficient to produce it with a stamp *ad valorem*, in order to give it in evidence, it ought to have the stamp peculiarly appropriated to such instrument.

THIS was an action of debt.

The declaration stated, "that the defendant by a certain deed-poll, agreed to purchase from the plaintiff the lease of certain premises at *Stratford* in *Essex*, for the sum of *5l. 5s.* and then averred that the plaintiff was ready and willing to sell and assign the said lease and premises to the defendant; and that he had tendered and offered to execute the said assignment to the defendant, on payment of the said *5l. 5s.* It then stated, That the defendant had refused to accept the said assignment whereby the debt accrued.

To this the defendant pleaded *non est factum*.

The deed-poll when produced in evidence, appeared to be stamped with a six shillings agreement stamp.

[244] The counsel for the defendant objected: that it could not be given in evidence, inasmuch as the instrument produced was a deed under seal, and therefore should have had the stamp proper for deeds, whereas this had merely an agreement-stamp.

They further attempted to prove, that at the time of the execution of this agreement, it was on an unstamped paper, and had no seals then affixed to it; but they failed in evidence as to this. They proved, however, by the evidence of a clerk of the stamp-office, that they will not there stamp any instrument under

under seal with an agreement-stamp, but that they consider such as a deed, which cannot be stamped after execution, under a penalty of 35*l.* besides the six shillings for the stamp. The inference they meant to draw from this was, that it had been sealed, and the words "and seals" added long after the execution and stamping.

The counsel for the defendant, under these circumstances, pressed the propriety of the Court's requiring that every instrument given in evidence should be stamped with the stamp particularly appropriated to it, as being liable to the abuse of which they had been complaining; and cited several of the statutes, imposing particular stamps upon deeds, deeds-poll, and other instruments.

The counsel for the plaintiff relied on this, that the amount of the stamps upon deeds and agreements was the same; and as this was a revenue act, contended that it was sufficient if the stamp was *ad valorem;* and said it has been often so ruled at [245] *Nisi Prius*, particularly in a case of *Allen* v. *Thomas*, before Mr. Justice GOULD, at *Maidstone*, *Espinasse Digest N. P.* 777.

Lord KENYON said, That he was disposed to be of opinion that a stamp *ad valorem* was sufficient; but that he would reserve the point.

The plaintiff therefore took a verdict subject to the opinion of the Court.

Mingay and ——— for the plaintiff.

Garrow and *Marryat* for the defendant.

In the next term it was moved to set aside the verdict; and that a nonsuit might be entered.

Lord KENYON delivered the judgment of the Court:—That the stamp should have been that appropriated to the instrument to be in evidence, so that the deed in question should not have been admitted; and that judgment of nonsuit should therefore be entered.

Vide *Farr* v. *Price*, East. Rep. 55.

WILSON *against* KENNEDY.

When the plaintiff declares on a note which has been given for a debt, the party may go into evidence of the debt for which the note is given, if the note has not the proper stamp so that it cannot be given in evidence.

ASSUMPSIT on a note of hand.

Plea of the general issue.

The note in question had been given by the defendant, in

lieu

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lieu of an acceptance of his, which was due when the note was given. *This acceptance, the defendant had been served with notice to produce; and had been entered into as an accommodation to one *Hayley*, who had got it discounted with the plaintiff.

The note when produced had not the proper stamp, and so could not be given in evidence; and it therefore became a question, Whether the defendant could not go into other evidence to establish the debt for which the note had been given?

Per Lord KENYON.—A promissory note is not like a bond which merges the demand; for if money is due for goods sold, or upon any such like account, and a promissory note is given for the amount of the debt, which note, afterwards, upon action brought, has not the proper stamp on it, so that it cannot be given in evidence, the party may resort to evidence on the goods sold, or the demand upon account of which the note was given.

Mingay and *Marryat* for the plaintiff.

Garrow for the defendant.

Vide *Aloes* v. *Hodgson*, 7 T. R. 241, & East. Rep. 58, in note.

Saturday, Dec. 13th.

Constructions upon several parts of the statutes 26 *G.* III. and 28 *G.* III. regulating the Southern Whale Fishery.

LACON Knight et alt. *against* HOOPER et alt.

THE plaintiffs in this action were the joint owners of the ship *Trelawney*, a vessel employed in the *Southern* whale-fishery.

The defendants were the commissioners of the customs. This action was brought for the purpose of ascertaining the plaintiffs' claim to certain bounties given for the encouragement of that fishery.

By *stat.* 26 *Geo.* III. and 28 *Geo.* III. two statutes by which the trade to the *South Seas* for the whale-fishery is regulated, a bounty of 700*l.* is given to the first five ships with the greatest quantity of oil and head-matter that should arrive in *England*.

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These ships, in order to entitle them to the bounty, are, by the acts of parliament, to sail within the first of *January* and the first of *November*; and to be out on their respective voyage not less than fourteen months, nor more than twenty-eight; and to return before the thirty-first of *December*: they are to carry out an apprentice for every fifty tons, and back again, unless it shall appear that the apprentice either died or deserted; and the

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the vessel must be registered under Lord *Hawkesbury's* act. These matters are to be verified by affidavits of the master, mate, and two of the mariners. Pursuing these regulations, and obtaining a certificate from the commissioners of the customs to the collector of the port to which the vessel belongs, they are entitled to receive the bounty. This was claimed by the plaintiffs, and by another ship making the same claim. The commissioners of the customs were only stake-holders, and of course nominal defendants only in this action.

The facts of the case were, that the ship *Trelawney* sailed from *Yarmouth* on the 29th *October* 1789, and returned from her voyage in *December* 1790, on the 27th of which month she arrived at *Carton Bay*, a small port in *Norfolk*, and on the 29th arrived at *Yarmouth*.

The first question arose upon the clause in the act of Parliament requiring the vessel to be out not less than fourteen months. [248]

Where the statute requires the ship to be absent 14 months, this means lunar, not calendar months.

Erskine, of counsel for the plaintiffs, contended that the vessel had been out the time required by the act of Parliament:—He insisted that her coming to *Carton Bay* could not be deemed the completion of her voyage, it being merely the touching at a port where no duties were ever taken on her return to the port of *Yarmouth*, from whence she had sailed, which she reached on the 29th of *December*, and which from the 29th of *October* of the preceding year, made exactly fourteen months: but even should it be held that the vessel's arrival at *Carton Bay*, on the 27th of *December*, should be deemed her return to *England*, which would be two days short of the computation of fourteen calendar months, he contended that the vessel was entitled to the bounty, inasmuch as the act of Parliament had used the word "months" generally, and this must mean lunar months, by which computation the vessel would have been out five weeks above the fourteen months required by the act.

The Attorney-General *(Sir John Scott)* on the other side, contended, that the ship's arrival at *Carton Bay* should be deemed an arrival in *England*, though no duties were in fact collected there, as it was within the exchequer survey of the port of *Yarmouth*, and was therefore to be considered as a member of it.

To this Lord KENYON assented.

As to the time, the Attorney-General contended, that at the custom-house, in all cases of bounties or such like limitations as to time, the uniform and established rule adopted there was to construe "months" as calendar, and not lunar months.

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Lord KENYON said, that the ideas of the officers of the customs were not to regulate the courts of *Westminster Hall* in the construction of acts of Parliament: that in the present case, the legislature had used the word "months" generally:—That in the uniform legal construction, a month so generally described was a lunar month, unless the context required a different construction; and he therefore was of opinion, in the present instance, that the ship had conformed to the act of Parliament, and had been out on her voyage the legal time required by it.

The Attorney-General then adverted to other parts of the act of Parliament imposing particular regulations and restrictions on the vessels going on this trade, without which such vessels were not entitled to receive the bounty.

Where the statute requires that the vessel shall carry out an apprentice for every fifty tons, and that it shall be verified by affidavit, the muster-roll containing the account of such apprentice at the sailing and return of the ship, and sworn to as directed, is sufficient.

One of these is, "that every vessel so engaging in such trade, shall take on board for the said voyage one apprentice for every fifty tons burthen; and that such apprentice so taken, at the fitting, clearing, and sailing of the said ship, was on board, and so continued during the voyage, unless such apprentice should die or desert the ship; which should be verified by the oaths of the master, mate, and two of the mariners."

The evidence to this was, the muster-rolls of the vessel at the time of clearing of the said vessel, and at her return to *Yarmouth*. In these muster-rolls the names of five apprentices appeared; the ship carrying 295 tons at the time of her clearing; and at her *return one was marked "dead;" another deserted. These muster-rolls were verified by the affidavits of the master, mate, and two of the mariners.

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The counsel for the defendants objected to this evidence, on the ground that the affidavit was informal; and also did not substantially satisfy the directions of the statute. They contended that the words of the statute ought to have been followed, stating the facts as to the number of apprentices, their sailing and continuing on board during the voyage, and their death or desertion, if such happened; but that even was the affidavit in question sufficient in point of form, it did not satisfy the directions of the statute: They contended, that the object of the act being that apprentices should go the voyage, it was material to see that they had done so; that the oath should therefore state their sailing and continuing on board during the voyage, whereas the oath here was only that at the time of clearing there was the proper number; but as a considerable interval might elapse between the clearing of the vessel and her sailing, and the statute required her

her to have the number at the time of her sailing, that the affidavit was substantially bad, as the apprentices might have died or deserted between the clearing and the sailing of the ship.

Erskine for the plaintiff answered, that the form of the affidavit was prepared by the officer of the customs at the port from whence the vessel sailed, and where she arrived; and that therefore it was not competent for the defendants to object to it for an informality proceeding from one of their own officers. As to the [251] substance, he contended, that having the number of apprentices prescribed by the statute at the time of clearing was sufficient; and that the muster-rolls, as verified by affidavit, were complete evidence.

Lord KENYON said, that he was of opinion the evidence offered was sufficient to satisfy the requisition of the act of Parliament, that the oaths which had been made in this case, were such as the statute required, and established the truth of the muster-rolls; and as the one at the time of clearing had contained the names of five apprentices, and the other at the ship's return had accounted for the defect of two, the one in consequence of death, the other of desertion, that it was therefore a fair inference that the vessel had carried out the proper number of apprentices on the voyage; nor should they presume that the death or desertion of the apprentices happened between the time of the ship's clearing and sailing:—His Lordship therefore upon that head ruled, that the regulation in that respect prescribed by the statute had been conformed to, and the plaintiffs entitled to recover.

Erskine, *Mingay*, and *Alderson* for the plaintiff.

The Attorney-General, *Bearcroft*, *Bower*, and *Wood* for the defendant.

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WYATT *against* THOMPSON.

Monday, Dec. 15th.

What is the custom as to the right of mooring barges to wharfs on the river *Thames*.

IN this case, though no matter of law occurred, yet as Lord KENYON in summing up the evidence given in it to the jury, stated it as involving a question of considerable public importance; as the verdict given in it would be evidence in any case of a similar claim; and as no record or report of it may elsewhere appear, it is therefore inserted among the cases in this collection.

It was an action of trespass *vi et armis*, for cutting a rope belonging to a barge, the plaintiff's property, by which the rope was spoiled, and the barge set adrift.

The

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The defendant pleaded, that he was possessed of a certain wharf, and that the rope was wrongfully and injuriously fastened and moored, by the said rope, to the said wharf, without his leave and licence; and that to prevent damage to his said wharf, that he had cut the said rope, *&c.*

The plaintiff by his replication stated, that the said wharf is situated on the river *Thames*, which is a common and ancient navigable river for all the king's subjects to pass and repass with their boats, vessels, and barges, at their free will and pleasure; that there now is, and from time whereof the memory of man is not to the contrary, hath been a certain ancient custom, that all the king's subjects sailing, rowing, and passing by and with their barges upon the said river during the time of low water, have been
[253] accustomed to moor and fasten, and of right at those times ought to moor and fasten, their said barges by affixing certain ropes, as well to their said barges as to all or any of the said wharfs most convenient for that purpose, and to keep them so moored and fastened until high water, leaving sufficient room during the time of such mooring and fastening, for all persons having occasion to use the said wharfs, or having occasion to sail, row, pass and repass with their barges and vessels upon the said river; and that the plaintiff having occasion to sail in and upon the said river, and to moor and fasten his said barge to the said wharf of the plaintiff, did fasten his said rope till the time of high water to the plaintiff's wharf, in pursuance of such right; and that the said plaintiff did of his own wrong cut the said rope as aforesaid.

The defendant by his rejoinder denied the right as set out in the replication, which was the issue in the case.

Several witnesses were called for the plaintiff, who proved the custom; some of them proved the custom to be in some measure variant from that proved by others with respect to the mooring to the piles in the front of the wharf.

Lord KENYON in his summing up to the jury, delivered it as his opinion, that the custom was proved as laid.

The jury (which was a special one) were out for some time, and then brought in the following verdict: "That the custom of mooring barges at low water, is for one tide at the piles in the
[254] front of the wharf; and if there are no piles, the custom does not allow the barges to moor at the wharf, unless through distress."

Mingay, *Shepherd*, and *Espinasse* for the plaintiff.

Erskine, *Garrow*, and *Giles* for the defendant.

END OF MICHAELMAS TERM IN THE KING'S BENCH.

IN

1794.

IN THE COMMON PLEAS AT WESTMINSTER, SITTINGS AFTER TERM.

RICHARDSON *against* TOMLIN.

Saturday, Nov. 9th.

In trespass with an *asportavit*, where the goods are proved to have been restored, so that there has been no carrying away and converting to the party's own use, and where the damages are under 40*s*. Q. Whether the plaintiff shall have full costs?

TRESPASS for breaking and entering the plaintiff's close, breaking up a saw-pit, and taking and carrying away the materials, and converting them to his own use.

The plaintiff proved the trespass as laid in the declaration, and the carrying away of the materials, by the command of the defendant; but it was also proved that they had been brought back and restored by the defendant's consent, and that the plaintiff had paid seven shillings and sixpence for restoring the saw-pit to its former condition.

A verdict was found for the plaintiff, with seven shillings and sixpence damages.

In taking the verdict, the associate was about to enter it up, as damages seven shillings and sixpence, costs forty shillings.

Adair, Serjt. of counsel for the defendant, objected to the taking the verdict and costs in this way, and insisted that there should be no more costs than damages, on the ground, that as under the present form of action the freehold could come in question, and the *asportavit* had been expressly negatived by the evidence, proving that the materials of the saw-pit had been restored; that by no possibility could the damages be held to be given on account of the taking, carrying away, and converting the materials to his own use, which alone could give the plaintiff a title to his full costs. [256]

It was answered, that the sum given in damages had been the sum paid by the plaintiff for restoring the materials of the saw-pit; and that that having been caused by the *asportavit*, was sufficient to entitle him to costs.

It was ruled by EYRE, Chief Justice, that the taking away being proved entitled the plaintiff to full costs, and that it was not necessary to prove a conversion further than in aggravation of damages, so that the evidence of the carrying away was alone sufficient to entitle the plaintiff to full costs.

Adair, Serjt. and *Onslow* for the plaintiff.

Le Blanc, Serjt. for the defendant.

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RICHARDSON *against* TOMLIN.

In the next term a rule was obtained to shew cause why the Master should not review his taxation, and why the plaintiff should not be allowed no more costs than damages. Cause was shewn before Mr. Justice BULLER sitting alone in Bank, when his Lordship was of opinion that the plaintiff was entitled to no more costs than damages; and the rule was made absolute.

SITTINGS AFTER TERM AT GUILDHALL.

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Saturday, Dec. 6th.

VAUGHAN *against* DAVIS.

Where goods are taken by way of distress for rent of the premises chargeable with the rent, and an action of trespass is brought for the taking, the defendant must plead the special matter in justification, and cannot give it in evidence under the general issue, under stat. 11 *G.* 2. *c.* 19.

TRESPASS *vi et armis*, for taking the plaintiff's goods. Plea of the general issue.

The evidence on the part of the plaintiff proved the taking of the goods at *Norwich*, as a distress for rent of certain premises lying in *Somersetshire*.

The defendant's counsel stated their client's defence to be, that the plaintiff was tenant to the defendant of certain premises at *Preston* in *Somersetshire*; and that the rent being in arrear, he had clandestinely removed the goods in question from *Preston* to *Norwich*, where the defendant had followed them, and seized them as a distress for the rent in arrear within the thirty days allowed by stat. 11 *Geo.* 2. *c.* 19.; and they were proceeding to give these facts in evidence.

Adair, Serjt. for the plaintiff objected to the defendant's going into evidence of these facts under the general issue, insisting that the special matter should have been pleaded.

The counsel for the defendant contended that they were entitled to do so under the words of the statute, which allows the party to plead the general issue, and to give the special matter in evidence.

The words of the statute 11 *Geo.* 2. *c.* 19. § 21. are, "That to any action of trespass or on the case brought against any person entitled to rent or services, their bailiff or receiver, or other persons, [258] relating to any entry upon the premises chargeable with such rent or services, or to any distress or seizure, sale or disposal of any goods thereupon, it shall be lawful for the defendants to plead the general issue, and to give the special matter in evidence."

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VAUGHAN *against* DAVIS.

Adair, Serjt. upon this clause of the statute contended, that it did not extend to the case in question; that the clause in the statute was confined to the case of an entry on the premises chargeable with the rent, and to a distress and seizure of goods on the premises, or, in the words of the statute, "*thereupon*;" whereas here the seizure was not made upon the premises, but after their removal.

ROOKE, J. ruled that the evidence was inadmissible under the general issue: he said that the construction contended for on the part of the plaintiff was the true one, and that he was of opinion that the intention of the legislature was, to confine the indulgence of so pleading to cases of distresses made upon the premises chargeable with the rent, as there might exist many reasons why the same indulgence should not be given to distresses made off the premises; and that if the defendant meant to have relied on the special matter, he should have pleaded it.

Adair, Serjt. and *Henderson* for the plaintiff.

Bond, Serjt. and *Morgan* for the defendant.

END OF MICHAELMAS TERM.

CASES

ARGUED AND RULED

1795.

NISI PRIUS,

KING'S BENCH;

IN

HILARY TERM, 35 GEORGE III.

SECOND SITTINGS IN TERM AT GUILDHALL.

Thursday, Jan. 29th.

HATTAM *against* WITHERS.

To prove usury in the discount of a bill of exchange, evidence that the plaintiff discounted two bills, one of which was the bill in question, and took for both together discount above legal interest, but without distinguishing how much was taken for the bill in question, is insufficient to support the issue.

ASSUMPSIT on a bill of exchange by the plaintiff as indorsee.

Plea of the general issue.

The bill in question was drawn by a person of the name of *Sargent*, in his own favour, on the defendant, and indorsed by *Sargent* to the plaintiff.

The defence to the action was, that the transaction, by means of which the bill came to the plaintiff's possession, was usurious.

To prove the usury, *Sargent* was called: he proved that *Hattam* the plaintiff had discounted two bills for him, the one for 38*l.* and the other that which was the object of the present action; and that he had paid discount for both together, to the amount of 8*l.* 10*s.* which was more than the legal interest for the time both had to run.

He was asked concerning the 38*l.* bill, How long it had to run?—The question was objected to, as no notice had been given to produce it.

Lord

Lord KENYON ruled, that the question could not be asked.

He was then asked, if he could distinguish how much had been paid for the discount of each particular bill?

The witness being unable to do so, Lord KENYON ruled, that the discount being on the two bills, forming a transaction which [260] was a joint one, that the witness swearing to usury upon both bills taken together, could not be admitted as evidence of usury on the particular bill in question; and that the defendant had therefore failed in proving his case.

The plaintiff had a verdict.

Garrow and *Lawes* for the plaintiff.

Mingay for the defendant.

LAST SITTING IN TERM AT WESTMINSTER. [261]

WIFFEN *against* ROBERTS.

Tuesday, Feb. 1st.

The indorsee of an accommodation bill, who takes it, knowing it to be such, and advances on it but part of the amount, can only recover as much as he has really paid. *Aliter* where the bill has been regularly drawn, on a fair account, in the course of trade: in such case, the indorsee may recover the whole.

THIS was an action of *assumpsit*, against the defendant, as the drawer of a bill of exchange.

Plea of the general issue.

The bill was drawn by one *Roberts*, in favour of *Thomas Ould* or order, on *Thomas Yates*, for 86*l.* dated 1st of *November* 1793, payable three months after date.

Yates accepted it, but did not pay it, and the defendant was therefore sued as drawer, on his default.

The defence on the merits was, that the plaintiff, the indorsee, knew that the bill was an accommodation one, between *Yates* and the defendant; and besides, had not paid the full value for it.

The first witness called for the plaintiff, on his cross-examination proved, that the bill was really an accommodation bill, and that it was known by the plaintiff to be so, and that he in fact had given for it but 29*l.*

Lord KENYON said, that where a bill of exchange is given for money really due from the drawee to the drawer, or is drawn in the regular course of business, in such case, the indorsee, though he has not given to the indorser the full amount of the bill, yet may recover the whole, and be the holder of the overplus above the sum he has really paid to the use of the indorser; but where the bill is an accommodation one, and that known to [262]

1795.

WIFFEN *against* ROBERTS.

the indorsee, and he pays but part of the amount, in such case he can only recover the sum he has actually paid for the bill; and if the plaintiff in this case was entitled to recover, he could only do it to the amount of 29*l.* the sum he really paid for it.

Where by mistake payment of a bill had been demanded from the acceptor the day before it became due, in an action against the drawer he shall be nonsuited, the demand being *premature.*

To prove a demand of payment of the bill from *Yates*, the acceptor, the plaintiff called the notary by whom it had been made: on producing the bill to him, it appeared that it had been noted as demanded, on the 3d of *February*; and he admitted that it had been demanded on that day.

Lord KENYON said, that the plaintiff must be called—that the bill did not become payable until the 4th of *February*, which was allowing the three days of grace, after the first of that month when the bill became due; and that non-payment by the acceptor on the day before the bill became due, was not such a default in him, as could authorize the holder to have recourse to the drawer.

The plaintiff was nonsuited.

Erskine and *Bayley* for the plaintiff.

Wigley for the defendant.

[263] LAST SITTING IN TERM AT GUILDHALL.

Wednesday, Feb. 10th.

M'NEIL *against* PERCHARD et alt. Sheriffs of *London.*

In an action against the sheriff, for money had and received—to prove that a certain person as bailiff received the money on an arrest, an office-copy of the writ and return; and which contains the name of such person, coupled with evidence that it is usual to indorse the bailiff's name on the writ, and that the person whose name so appears is a bailiff, and made the arrest—is evidence to charge the sheriffs.

ASSUMPSIT for money had and received.

Plea of the general issue.

This action was brought to recover the sum of 106*l.* under the following circumstances.

The plaintiff being indebted to one *Parks*, a writ issued, directed to the defendants, sheriffs of *London*, to hold him to bail for that sum, at the suit of *Parks*.

The sheriffs directed their warrant to one of their officers of the name of *Kellet*, who arrested the plaintiff; and who upon the arrest being made, paid into *Kellet*'s hands the above-mentioned sum of 106*l.* which *Kellet* undertook to return, on the plaintiff's putting in and justifying bail to the action; the plaintiff did put in and justify bail; and the present action was brought to recover the money so paid into *Kellet*'s hands,

which

which he had not returned to the plaintiff pursuant to his undertaking.

The plaintiff produced in evidence an office-copy of the original writ, and the return, which the witness swore he had compared with the original.

Mingay, for the defendant, asked him, how he had compared it? He said, that after it had been transcribed, he held in his hands the copy now produced, while a witness read over the original. He was then asked if he had compared it by the same persons reading over this copy while he held the original?

He said he had not.

Mingay then objected: that this was necessary in order to shew it to be a true copy, and to make it evidence.

Lord KENYON over-ruled the objection; and held that what had been done was sufficient. [264]

The counsel for the plaintiff then called a witness, who had been *Kellet's* follower when he arrested the plaintiff, to prove the arrest; and that *Kellet* was an officer of the sheriffs of *Middlesex*.

Mingay objected: that this evidence was in that shape inadmissible; and that it was necessary to implicate the sheriffs in this transaction, in order to maintain the action, which could only be by shewing that *Kellet*, to whom the money had been paid, was an officer of the sheriffs, and, in the case in question, acting under their authority; and that the warrant to arrest the plaintiff had been directed to him: and that to prove *Kellet* an officer, and to connect the transaction with the defendants for that purpose, the writ and warrant grounded on it, which had been directed to *Kellet*, ought to be produced.

The plaintiff had not the writ or warrant, but in the office-copy of the writ and return above-mentioned, produced by the plaintiff. After setting out the whole at length, it then set out the indorsement for the sum for which the party was to be held to bail, the attorney's name; and there was also on it the name of *Kellet*; after which was the return. [265]

They then proved, that it was the usage of the sheriffs' office to indorse on the writ the name of the officer to whom the warrant to arrest grounded on the writ was delivered; and that the name of *Kellet* so contained in the office-copy of the writ and return, if a regular transcript of the whole writ and return must have meant to represent *Kellet* as the officer to whom the warrant was directed.

Lord

1795.

M'Neil *against* Perchard, et alt. Sheriffs of *London.*

Lord Kenyon ruled, that the name of *Kellet* being so contained in the office-copy, produced in evidence, coupled with the explanation given by the witness, was evidence to prove that *Kellet* was an officer of the sheriffs of *Middlesex*, sufficient for the purpose of the action.

Garrow and *Marryat* for the plaintiff.

Mingay for the defendant.

The plaintiff had a verdict. It seems, however questionable how far the action is maintainable on principle, as the act of the bailiff in this instance seems not to have been within the scope of his office, nor part of his duty as an officer of the sheriffs; it seems therefore that the action should have been against the bailiff himself, not against the sheriff.

[266]

SITTING DAY AFTER TERM AT GUILDHALL.

Saturday, Feb. 14th.

Shirley *against* Newman.

Where rent is reserved quarterly, it does not dispense with the necessity of six months' notice to quit. But when three months' notice only were given, and the lessor neither expressed an assent or dissent to the admitting it, and took the rent up to the time when the tenant quitted, it shall be taken as a waiver of the regular notice to quit, and an acquiescence on the [part] of the [les]sor.

Assumpsit for use and occupation.

Plea of the general issue.

The defendant had been tenant to the plaintiff from year to year, commencing at *Lady-day*; the rent was payable quarterly: at *Christmas* the defendant gave notice that he would quit the premises at the *Lady-day* following; the circumstances as proved on his part were, that this notice to quit had been left at the house of the person who received the rents of the estate; that he had put it on his file of notices, and had neither expressed his assent or dissent to the accepting it as a notice to quit.—The rent was paid up to *Lady-day*, when the tenant quitted; and the action was for rent accruing subsequent to that time.

The defendant relied on two grounds: first, That the rent being payable quarterly, that a quarter's notice to quit was sufficient; but, secondly, That if by law it was not sufficient, that the defendant's acceptance of the notice to quit at the end of three * months, and that being at the end of the year, was a waiver of the notice, which by law would otherwise be necessary.

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It was answered by the counsel for the plaintiff, that the manner of paying the rent made no alteration as to the tenancy, which

which was from year to year; and that it therefore was incumbent on the defendant to have given half a year's notice of quitting, as was required by law, in cases of such holdings. As to the second point, they insisted that the tacit receipt of a notice, without any evidence of acquiescence on the part of the plaintiff, could not be construed into a waiver of the regular notice.

Lord KENYON said, that the tenancy was from year to year; and that in such cases no notice short of six months, and determinable with the year was sufficient; and that the mode of payment of the rent, whether half-yearly or quarterly, was a collateral matter, and no dispensation or qualification of the regular six months' notice required by law: but his Lordship added, that by agreement, the parties might dispense with the notice, and the acquiescence of the parties was presumptive evidence of such agreement; and he was of opinion, that in this case there was evidence of acquiescence, as the plaintiff had received the notice to quit at the end of three months, and never expressed to the defendant any dissent whatever, which he thought he should have done, if he had meant to have refused his assent to the defendant's quitting according to the notice.

Erskine and *Shepherd* for the plaintiff.

Mingay for the defendant.

RICHARDS *against* BARTON.

Same day.

Assumpsit will lie to recover the expenses of the conveyances, and the interest of the money procured to purchase an annuity where the grantor has misrepresented the charges affecting the estate to be charged with the annuity.

THIS was an action of *assumpsit*.

The declaration stated that the defendant, in consideration of 3200*l.* to be by him paid, had agreed to grant to the plaintiff a certain annuity of 400*l.* *per annum*, charged upon a certain estate of his the defendant's, and that he had represented that the said estate was affected with only one judgment for 1000*l.* payable to his brother; that on this representation the plaintiff agreed to purchase the said annuity; that the deeds and conveyances necessary were accordingly prepared, and the plaintiff had procured the said sum of money for that purpose. It then averred that, before the said deeds were executed, it appeared that the said premises were charged with a further judgment of 5000*l.* in consequence of which the plaintiff declined to proceed further in the purchase; and the action was brought to recover the expenses

1795. penses of the conveyance, and the interest of the money from the time the plaintiff had prepared it, till the treaty was at an end.

RICHARDS *against* BARTON.

For the defendant it was relied, first, that it was incumbent on the plaintiff to have searched for judgments before any of the deeds or conveyances were put in hand, or any expense incurred on that account; and that on the same principle the plaintiff should not have come forward with his money, so as to charge [269] the defendant with any interest, until he had seen a clear and indisputable title: and as to the charge of the latter judgment, they gave in evidence, that they had offered to have satisfaction entered upon that judgment; but it was by power of attorney from the person who had the judgment; and who was then abroad.

For the plaintiff it was proved, by the attorney employed by him, that he had received an abstract of the defendant's title to the estate about to be charged with the annuity, which mentioned but one charge of 1000*l.* to his brother; that upon his inquiring if there were any other judgments affecting the estate, the defendant assured him there were none; that he therefore did not then search for judgment, but deferred it till the execution of the deeds, to save a double search.

Lord KENYON ruled, that the plaintiff was clearly entitled to recover: his Lordship said that an abstract ought to mention every incumbrance whatever affecting an estate upon which any security was about to be placed; and should therefore contain an account of every judgment by which the estate was affected; that the abstract therefore in this case was objectionable in that respect, nor was the objection removed by the offer to have satisfaction acknowledged under a power of attorney, as that was liable to objection; and it had been decided by Lord *Hardwicke*, that a party was not bound to accept of any conveyance, or any agreement, executed under such circumstance. That [270] with respect to the searching for judgments, the conduct of the plaintiff's attorney had been perfectly proper, for as it was absolutely necessary to search for judgments immediately before the conveyances were executed, lest some judgments should have been entered up during the treaty, that he had assigned a very proper reason for not having done so at first, namely the plaintiff's assertion that no judgment did in fact subsist charging the estate, except one for 1000*l.* before mentioned, and as it saved expense of a double search for judgments.

Ante 116.

The

The plaintiff had a verdict. 1795.

Law and *Dallas* for the plaintiff.

Erskine and *Baldwin* for the defendant.

RICHARDS *against* BARTON.

SITTINGS AFTER TERM AT WESTMINSTER.

SCARMAN *against* CASTELL.

Monday, Feb. 16th.

A master is bound to pay for medicines and attendance on his servant, while such servant remains under his roof and part of his family. Q.

THIS was an action on the case, to recover the amount of an apothecary's bill, for medicines furnished to and attendances on a servant of the plaintiff's.

Lord KENYON said, That he was of opinion that a master was obliged to provide for his servant in sickness and in health, and that he therefore was liable for medicines furnished to his servant while in his service. Not that his servant was at liberty to go abroad and contract debts for medicines; but that while he was under his master's roof, the master was under a legal, as well as a moral obligation, to provide the necessary medicines, [271] and to pay for such as were administered to his servant under such circumstances.

Burrough, as an *amicus curiæ*, mentioned that a case of this sort had been argued before Lord MANSFIELD and the Court of King's Bench, in the year 1782, in which it had been resolved, That a master was not so liable.

The counsel for the defendant said, it was a case of *Luby* v. *Wiltshire*, in which that point had been decided.

It was answered by the plaintiff's counsel, that the case cited was of a servant in husbandry, and the action was an action of *assumpsit* by the parish-officer, to recover the amount of a surgeon's bill paid by them for the cure of the defendant's servant; which was adjudged to be not maintainable.

Lord KENYON said, the distinction seemed to be a reasonable one, and that case distinguishable from the present.

The plaintiff recovered.

Erskine and *Lawes* for the plaintiff.

Garrow for the defendant.

1795.

Same day.

STONEHOUSE *against* ELLIOT.

An action of false imprisonment will not lie where the party has been taken into custody under a charge, and brought before a magistrate, though he is by him discharged. The action should be *case* for malicious prosecution.

THIS was an action of trespass for an assault and false imprisonment.

Plea of Not Guilty.

The case as stated and proved on the part of the plaintiff was, that the plaintiff on the 21st of *November* was at *Drury Lane* play-house; the defendant was there also, and had her pocket cut from her side, containing five guineas and a ring: she left the play-house, and brought in a constable for the purpose of apprehending the person who had picked her pocket; she at first fixed on a different person; but afterwards charged the plaintiff, who was in consequence apprehended, and brought before the justices at *Bow Street* office, where he was discharged, there being no pretext for charging him.

When the case was opened by *Erskine* for the plaintiff, Lord KENYON expressed a doubt, whether the action was maintainable in its present form? and whether it should not have been *case* for malicious prosecution?

Erskine said, that the distinction was, where a person was apprehended under a warrant, or without one. That where there was a warrant, this action was not maintainable; but that where a party makes a charge, and that turns out to be unfounded, and there is a consequent unlawful detention of the person, that there the action is maintainable.

Wood, on the same side, cited a case, said to have been so decided by Mr. Justice BULLER, and added, that the defendant might in this action have justified, by which the whole matter [273] would have come before the Court, as well as in an action for a malicious prosecution.

Lord KENYON said, That to bring the action in the present form for such an offence, seemed to him to break in on the settled distinction of actions. That the defendant had adopted the proper and legal course under the circumstances in which she was placed; and that to allow an action of false imprisonment to be maintained whenever the party happened to be mistaken, would be injurious, and would deter parties from charging persons really guilty of such offences: that the proper action therefore seemed to be an action on the case, and the action in its present form could not be maintained; but as Mr. *Wood* had cited

cited so respectable an authority, he would suffer the plaintiff, as he had proved his case, to take a verdict, with liberty for the defendant to move to set it aside, and have a nonsuit entered.

1795. — STONEHOUSE *against* ELLIOT.

Erskine and *Wood* for the plaintiff.

Garrow and *Gibbs* for the defendant.

WILSON *against* CLARK.

Tuesday, Feb. 17th.

Case for use and occupation of a house, describing it as in a certain parish, if there is no such parish, it is fatal.

ASSUMPSIT for use and occupation of certain premises of the plaintiff's, described in the declaration as "lying and being in the parish of *Sydenham* in the county of *Kent*."

Garrow for the defendant stated that there was no such parish as *Sydenham* in *Kent*, *Sydenham* being part of the parish of *Lewisham*.

Per Lord KENYON. It cannot be got over; the plaintiff must be called.

Erskine and *Russell* for the plaintiff. [274]

Garrow and *Lawes* for the defendant.

DANIEL *against* CARTONY.

Same day.

Where a bill of exchange has been given for a *bona fide* consideration, usury in any of the intermediate indorsements, shall not avoid it in the hands of a *bona fide* indorsee, in an action against the acceptor.

ASSUMPSIT on a bill of exchange drawn by one *Scott*, in his own favour, and accepted by the defendant.

Erskine said, He was instructed to make this defence, That the bill was drawn by *Scott*, in his own favour; that he discounted it with one *Greensil*, who took for it above 18*l. per cent.* but that he had nothing to impeach the transaction by which the plaintiff had become possessed of it.

Per Lord KENYON.—It is no defence. If the note had been originally given on an usurious transaction, or for an usurious consideration, it would have been void in the hands of even a *bona fide* holder; but usury in any intermediate transaction respecting it, can never make it void in the hands of a *bona fide* indorsee, where there was no usury in the original transaction. [275]

Mingay and *Baldwin* for the plaintiff.

Erskine for the defendant.

The

1795.

Same day.

The Governor and Company of the *Chelsea Water-works against* Cowper.

Where a bond is of 30 years standing, and found among the papers of a public company, or of the obligee who is deceased, it shall be admitted without proof by the subscribing witness.

THIS was an action of debt upon bond against the defendant, as executor of Sir *George Littleton.*

Plea 1st. *Non est factum.* 2d. *Plene administravit.*

In the year 1768, Sir *George Littleton* having procured for a servant of his, of the name of *Broadhurst,* the place of collector under the *Chelsea Water-works* Company, had joined in the present bond, as a surety for the faithful accounting and paying over to the company, of the sums collected by him in the course of his duty.

The bond was produced by the secretary of the company, from among the company's papers; and he swore it was in the hand-writing of the person who was secretary at the time it bore date.

A witness was called on the part of the plaintiff, to prove the hand-writing of Sir *George Littleton,* subscribed to the bond. But he was unable to swear to it.

Lord Kenyon said, that he would admit the bond without proof, it being above thirty years date.

Chambre for the defendant submitted, that there should be some evidence offered to prove the hand-writing of the subscribing witness: that this differed from the case of a deed which respected land, as there, possession having gone with the deed, confirmed it, and that the rule should be confined to such cases only.

[276] Lord Kenyon said, that all deeds above thirty years date proved themselves; that it was therefore not requisite to go into further proof, particularly in the case of the present bond, as it had been produced by the secretary of the company, from among their papers, and in the hand-writing of the person who was secretary at the time it bore date; which gave it a degree of authority. His Lordship therefore admitted it, without further evidence.

Upon the issue of *plene administravit,* the defendant's counsel admitted, that the defendant had assets from Sir *George Littleton* sufficient to satisfy the debt; but stated, that twenty-two years ago he had paid over the whole of Sir *George Littleton*'s property which he had then in his hands to the Duke of *Bridgewater,*

water, as residuary legatee; and that he had now nothing remaining in his hands, nor had he till the bringing of the present action any notice that there was such a claim as that now made, subsisting against the estate. 1795.

Chelsea Water-works' Company *against* COWPER.

*Lord KENYON said, that he was of opinion, that where an executor or administrator has satisfied the debts and legacies affecting the testator's or intestate's estate, and paid over the remainder to the residuary legatee; and has had no notice of any other subsisting demand, provided he had not done it too precipitately, that it was a good answer to an action, such as the present: that the statute having directed that no legacies should be claimed before the end of one year, from the testator's death, seemed to have meant to give that time for creditors to the estate to make their claims, or at least to give notice to the executor or administrator, that there were such claims subsisting; and that as in the present case the debt was of such long standing, and unclaimed for such a number of years, and the remainder of the estate paid over to the residuary legatee, he was of opinion that it was complete evidence of *plene administravit*, in favour of the executor; but his Lordship added, he would reserve that point. [*277]

Where the executor has paid all the debts and legacies, after the year, from testator's death expired, and paid over the remainder of the estate to the residuary leg it is good evidence on *plene administravit*.

The plaintiff was going to take a verdict for the penalty; *Chambre* for the defendant insisted, that the plaintiff should prove the damage he had sustained, as it was now settled that the jury under the stat. 8 & 9 *W.* III. should assess the damages.

Wood for the plaintiff said, that was the case where the bond was for the performance of articles, or matters referred to in another indenture or instrument; not where the matters were contained in the condition of the bond.

Lord KENYON said, that the jury should assess the damages.

The plaintiff therefore took a verdict, to the amount of the damages proved, subject to the opinion of the Court on the point reserved.

Erskine and *Wood* for the plaintiff.

Chambre and *Cowper* for the defendant.

On Lord KENYON'S coming into Court the next morning, his Lordship mentioned, that he had a note of decision before Lord MANSFIELD, which he read to the Court, in which Lord MANSFIELD had ruled the same point respecting the proof of a bond of above thirty years standing, which he had done. The case was *Forbes* Administrator of *Henchett* v. *Wall*, Sittings at *Guildhall*, [278]

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Chelsea Water-works' Company *against* COWPER.

hall, Michaelmas 1764; it was an action of debt upon a bond dated 20th *March* 1732; on *non est factum* pleaded: the plaintiff produced at the trial the bond, insisting that it proved itself by its antiquity; it was objected by Mr. *Dunning*: that it ought to be authenticated, and that a deed of that age will not itself be sufficient, unless possession or something equivalent had gone with it. Lord MANSFIELD allowed the distinction.

Upon which the plaintiff called a witness to prove the handwriting of the obligor, and insisted that that was sufficient to entitle him to have it read; but no account was given of the subscribing witness. Lord MANSFIELD still thought the proof defective, and nonsuited the plaintiff, at the same time declaring, that if proof had been made that the bond had been found among the papers of the deceased, he would have allowed the evidence.

[279] *Vide* S. C. 1 *Black. Rep.* 532.; where the objection stated is, that there being no proof of payment of interest, or any other mark of authenticity, if the length of date was alone sufficient to establish it, that any knave might forge a bond, with a very ancient date, and recover on it. It appears further in the report of that case, that one of the subscribing witnesses was living.

Same day.

BROWN *against* M'KINALLY.

Where a party sued on a claim which he knows to be founded, *pays it voluntarily and with notice, it is not recoverable back in *assumpsit*, though at the time he pays it, he declares that he pays it without prejudice to his right to recover.

** Knibbs v. Hall*, ante 84.

ASSUMPSIT for money had and received.

Plea of the general issue.

*The plaintiff and defendant being in the same line of business, entered into an agreement, by which the defendant agreed to sell the plaintiff all his old iron, except bushel-iron, which was of an inferior quality, at 9*l.* *per* ton.

The iron he delivered was mixed iron, of an inferior value, being part bushel-iron, and charged the full value of the best sort; the plaintiff objecting to the charge, the now defendant brought an action for it.—The plaintiff paid the full demand so made on him, at the same time telling the defendant, that he did it without prejudice; and meant to bring an action to recover back the overplus so paid.

This action was brought for that purpose.

When the case was opened by the plaintiff's counsel, Lord KENYON said, that such an action could not be maintained. That to allow it, would be to try every such question twice; for that the

the same legal ground that would intitle the plaintiff to recover in the present action, would have been a good defence to the action brought against him by the present defendant; at which time and in which manner he should have proceeded: that money paid by mistake was recoverable in *assumpsit*; but here it was paid voluntarily, and so could not be recovered under the circumstances of this case. [280]

Erskine and *Reader* for the plaintiff.

Garrow for the defendant.

MITCHELL *against* WRIGHT.

PER Lord KENYON. In delivering a particular under a judge's order, where there has been an account current, and payments made, for which the party means to give credit, the particular ought to contain as well all those matters for which he means to give credit, as those for which the action is brought.

REX *against* CRESPIGNY.

Wednesday, Feb. 18th.

An indictment for perjury cannot be maintained, where the supposed perjury depends on the construction of a deed.

THIS was an indictment against the defendant for perjury. Plea of Not Guilty.

The case stated on the part of the prosecutor was, that in the year 1783, the defendant being procurator-general of the Court of Admiralty, resigned that office to a person of the name of *Heseltine*, reserving to himself the emoluments of all such suits as had been commenced during his time, and which were then depending.

Soon after this transaction, wishing to retire from all concern with the business, he treated with the prosecutor Mr. *Dickinson*; and by deed between him and *Dickinson*, he assigned over all his right before reserved in his agreement with *Heseltine*, giving to *Dickinson*, by the same deed, a power to prosecute all actions then depending in his name: but to receive the profits on his own account. [281]

One *Utterson* having become indebted to *Dickinson*, for business done in the Court of Admiralty, was sued by him in the Court of Common Pleas, in *Crespigny*'s name.

In that suit, on a motion to stay proceedings, *Crespigny* made an affidavit, wherein he swore that in the year 1783, he had resigned his place to *Heseltine*; and that from that period, he had

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REX *against* CRESPGNY.

not authorized any person to sue in his name: and that the action then depending against *Utterson*, was brought in his name without his authority.

Upon this affidavit the perjury was assigned.

Lord KENYON, on this statement being made, asked *Garrow* (who led for the prosecution) if the perjury did not turn on the construction of the deed, as to what passed under it from the defendant to *Dickinson?*

Garrow admitted, that in a great measure it did.

His Lordship then said, that the indictment could not be maintained; that if the defendant had in any manner acted inconsistently with the obligation entered into by his deed, that it

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was the object of a civil action; but that where the injury arose from a misconception or mistake in the construction of a clause in a deed for such an injury, an indictment for perjury could not be supported.

His Lordship therefore directed a verdict of acquittal.

Garrow and *Wigley* for the prosecution.

Erskine, *Mingay*, and *Gaselee* for the defendant.

Same day.

COLLS *against* LOVELL.

In an action against a bankrupt on a new promise—proof that the plaintiff petitioned the Lord Chancellor against the allowance of the defendant's certificate, shall be held to be a waiver of the agreement by the bankrupt to pay and answer to the action.

THIS was a special action on the case in *assumpsit*, in which the plaintiff declared, "That the defendant having become a bankrupt, and being then indebted to the plaintiff, in consideration that the plaintiff would not prove his debt under the commission, he undertook to pay him eighteen shillings in the pound on his debt; and to bring forward another person to secure to him the payment of that sum;" it then averred that the defendant had not paid, nor brought forward any person to secure him that sum, by reason whereof the defendant became liable, *&c.*

Plea of *non-assumpsit*.

The plaintiff proved by a witness a treaty for an agreement in substance as stated in the declaration; but the witness in his cross-examination, admitted that the plaintiff had petitioned the great seal against the allowance of the defendant's certificate.

The counsel for the defendant contended, that this was a waiver of the agreement, and deprived the plaintiff of all claim to any benefit to be derived under it.

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Lord KENYON held that it did so. His Lordship observed, that the agreement upon which the present action was founded, must

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COLLS *against* LOVELL.

must be supposed to have been entered into with a view to discharge the defendant from his debts, by the plaintiff's co-operating in the discharge, which the defendant would obtain by means of his certificate: that the plaintiff, by opposing the defendant's certificate, had been guilty of *mala fides*, as defeating the object of the agreement by an act totally inconsistent with it. That he should therefore be held to have abandoned it, and not now be allowed to resort to it, or to maintain an action which had the agreement for its foundation.

His Lordship therefore directed a nonsuit.

Mingay and *Gibbs* for the plaintiff.

Garrow for the defendant.

MAY *against* SMITH.

Thursday, Feb. 19th.

To prove the dissolution of a partnership, the copy of the advertisement inserted in the *Gazette*, by which the parties agreed to dissolve the partnership, is not evidence unless it is stamped; for it is offered in evidence as an agreement, and so should have an agreement stamp.

ASSUMPSIT for money had and received on an account stated.

Plea of the general issue.

The case as stated by the plaintiff's counsel was, that the defendant and he had been in partnership in trade, which partnership had been dissolved in *October* 1794; that all accounts *between them had been referred to arbitration, when a balance was settled to be due to the plaintiff, to recover which the present action was brought.

The defendant denied that any dissolution of the partnership had taken place, or that any account had been settled or adjusted; and that of course one partner could not maintain an action against another for an unliquidated balance.

Erskine for the plaintiff stated, that he would prove the partnership dissolved by the following evidence, *viz.* that as it was necessary to give notice in the *Gazette* of the dissolution of partnership, and the *Gazette* required that the advertisement giving notice of the dissolution, should be attested by a witness, and left at the *Gazette* Office, he would produce the original from which the advertisement in the *Gazette* was printed, which was an agreement to dissolve the partnership, signed by both parties, and attested by a subscribing witness, whom he would call. [*284]

This paper when produced, appeared to be a piece of paper

 containing,

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MAY *against* SMITH.

containing, in writing, the usual form of advertisements, as inserted in the *Gazette*, giving notice of dissolution of partnership, *viz.* "That *John Smith* and *Mary May* had that day agreed to dissolve partnership," *&c.*

Mingay, for the defendant, objected that this on the face of it purported to be an agreement, and as such could not be given in evidence without an agreement stamp.

It was answered for the plaintiff, that it was not an agreement, but offered in evidence merely to shew that the parties had in [285] fact dissolved their partnership.

Lord KENYON, after referring to the statute, said that it was necessary it should have been stamped, otherwise he could not admit it: that the statute required a stamp upon all papers to be given in evidence, in *proof of any agreement*: that the paper in question was offered as evidence of an agreement between the parties to dissolve the partnership; and was therefore inadmissible without a stamp.

The plaintiff was nonsuited.

Erskine and *Baldwyn* for the plaintiff.

Mingay and *Russell* for the defendant.

[*286]

REX *against* GILHAM.

Friday, Feb. 20th.

Where a witness is sworn on the New Testament, who admits that he was born a Jew, but the tenets of which religion he had never formally abjured, and was never baptized or admitted into the Christian church, he is an admissible witness—though the oath has been so taken by him—on his asserting, that he then considered himself as a member of the established religion and bound by its precepts.

THIS was an indictment against the defendant, an attorney, under statute 17 *Geo.* III. 26. for taking more than ten shillings *per cent.* as allowed by the statute for procuration money on the sale of an annuity.

To prove the case on the part of the prosecution, a person of the name of *John King*, a money-broker, was called as a witness; he was sworn in the common form on the New Testament.

When he was proceeding to give his evidence, he was stopped by *Gibbs*, of counsel for the defendant.

* He was asked of what religious persuasion he was? He answered, of the Protestant—He was then asked, if he had been always of that persuasion? He said he had not; that he was born a Jew, but had been of the established religion since he had been

of

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REX *against* GILHAM.

of capacity to judge for himself, and that he now professed to be of that persuasion.

In the course of his examination, he admitted that he had been married according to the Jewish rites; and that his first wife had been a Jewess.

He was lastly asked, if he had ever been baptized, or had ever formally renounced the Jewish persuasion? He answered, that he had never been baptized, nor had ever formally renounced the Jewish religion, or been admitted a member of the established church.

On this admission, *Gibbs* objected to his testimony: that having been sworn on the Gospels, and never having been admitted a member of the Christian church, that he could not consider an oath so taken as obligatory; and that his testimony being unsanctioned by such obligation, was inadmissible.

Lord KENYON said, that he was of opinion that his testimony was admissible; that notwithstanding he had admitted that he had been of the Jewish persuasion, yet having sworn that he now considered himself as a member of the established religion, and bound by the precepts of that religion, that he should deem the obligation of an oath so taken as sufficiently binding. His Lordship cited the case of *Omichund* v. *Barker*, 1 *Atk.* 21.; and admitted his testimony. [287]

Where an entire sum is taken on account of procuring and securing an annuity, and it is averred that such sum was taken for soliciting, procuring, and proving that part of that sum was taken for the deeds, is not a variance.

In the indictment it was averred, that the defendant had taken 320*l.* for soliciting and procuring the sum of 2450*l.* being the purchase-money of a certain annuity; and it appeared that part of that sum had been taken for deeds, *&c.* the remainder as procuration.

This was objected to as a variance.

Lord KENYON ruled, that the whole sum being taken for and on account of the entire transaction for procuring the money for the annuity, that it should not be so taken by parts, but the whole be deemed an act done on account of procuration; and so that there was no variance.

Fielding, *Shepherd*, and *Raine* for the prosecution.

Mingay and *Gibbs* for the defendant.

The defendant was found guilty.

OXLADE

1795.

OXLADE *against* PERCHARD et alt. Sheriffs of *London*.

Same day.

The bankrupt himself is an admissible witness to explain a doubtful act which may be or not an act of bankruptcy; as whether an arrest relied upon as a concerted and fraudulent one, was so or not.

THIS was an action on the case, against the sheriffs, for a false return.

It was brought to recover a quantity of goods, &c. belonging to one *Benjamin Beet*, then a bankrupt, which the defendants had seized under an execution, at the suit of the plaintiff, and to which the defendant, being indemnified by the assignees of *Beet*, had returned *nulla bona*.

The question turned upon the time when an act of bankruptcy had been committed by *Beet*.

The act of bankruptcy, upon which the assignees relied, was the bankrupt's having procured himself fraudulently to be arrested.

The circumstances as they appeared in evidence were, that *Beet* had been indebted to the plaintiff in a large sum of money, from
[288] the year 1781. On the 27th of *September* 1794, the plaintiff's attorney brought a writ to a sheriff's officer in *Chancery Lane*: the officer declined to execute it for so large a sum, and particularly as the old sheriffs were then going out of office. The attorney told him that he would indemnify him; that the matter would be settled in a quarter of an hour by *Beet*, whom he was about to arrest. In a short time after, *Beet* appeared, and was arrested; and gave the warrant of attorney upon which the judgment had been entered up, and the present execution taken out.

The counsel for the assignees relied upon this as a concerted plan between the plaintiff and *Beet* the bankrupt, to procure himself to be arrested, to give a colour to the warrant of attorney, which the bankrupt then executed to the plaintiff.

The plaintiff's counsel denied that there was any concerted plan between the plaintiff and *Beet*, and alleged that it was an adverse arrest. They explained the transaction, by stating that *Beet*, on the evening upon which the arrest was made, had been sent for by the plaintiff, upon a pretended message, that he wanted to see him upon business; and proposed to call the bankrupt
[289] himself, to prove that the arrest was totally unexpected by him on the evening on which it was made; and that there was no plan whatever thought of, or concerted between the plaintiff and him, to procure his arrest at the time it took place.

It was objected by the defendant's counsel, that this could not be

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OXLADE *against* PERCHARD et alt.

be done: that it was a settled rule, that a bankrupt could not be called to prove any matter respecting his own act of bankruptcy.

Lord KENYON said, that it certainly was a principle of law, that a bankrupt could not be called to prove an act of bankruptcy committed by himself; but that the converse of that had never been decided, that a bankrupt could not be called to disprove it, as to explain a doubtful or equivocal act: that the reason why a bankrupt could not be called to prove an act of bankruptcy committed by himself was, that it was a criminal act in the eye of the law: that it had been decided in a modern case, that the declaration of a bankrupt was admissible evidence, to prove *quo animo* he had left his house; his absconding being relied upon as the act of bankruptcy; [his Lordship alluded to the case of *Bateman* v. *Bailey*, 5 *Term Rep.* 512.] that he was therefore of opinion, that in the present case, the bankrupt was an admissible witness to prove whether the arrest was a concerted or an adverse one; and his Lordship admitted him accordingly.

The plaintiff had a verdict.

Erskine, *Garrow* and *Lawes* for the plaintiff.

Law and *Wood* for the defendant.

SITTINGS AFTER TERM AT GUILDHALL.

[290]

Monday, Feb. 23d.

COWEN et alt. *against* SIMPSON.

If a person employs an agent to take orders (a representation is made to him of the solvency of a person whom he advises his employers to trust for goods, if he at the time knew that such a person was not solvent, though he did not communicate it to his employers) they cannot maintain an action against the person who made such false representation.

THIS was an action on the case against the defendant, in the nature of an action of deceit.

The declaration stated, that the defendant had falsely and fraudulently represented to a person of the name of *Piper*, who was then an agent employed by the plaintiffs, who were wine-merchants, that one *Walter Green* was a person safely to be trusted: that they relying on such representation, did trust him with liquors to a considerable amount; whereas the said *Green* was then in insolvent circumstances, and had not paid for the said liquor or any part thereof.

The defendant pleaded Not Guilty.

The plaintiffs proved by the evidence of *Piper*, that *Green* had been so represented by the defendant as a person to whom the plaintiffs might give credit; and that at the time the defendant himself was in possession of *Green*'s house, under an execution,

and

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COWEN et alt. *against* SIMPSON.

and was at the same time soliciting a composition-deed for him among his creditors.

[*291] *The defendants endeavoured to establish, that the insolvency of *Green* was notorious, and well known to *Piper* himself.

Lord KENYON, in summing up to the jury, observed, that if the fact as stated by the defendant's counsel had been proved, that the action could not be maintained: that they should consider the plaintiffs as adopting all the acts of *Piper* their agent, and standing precisely in the same situation that he did: that however false the account a person might give to a trader of the character or property of a third person with whom he was about to deal, if the trader knew from his own knowledge that such third person was not to be trusted, he should not by a pretended reliance on the representation made by such third person, charge him for goods furnished to one whom at the time he knew was unable to pay for them: that it was the same in the present instance, in the case of an agent; for however reprehensible the conduct of the defendant might be, yet if *Piper* knew that *Green* was insolvent at the time, and yet made a favourable report of his circumstances to the plaintiffs, in consequence of which they were induced to trust him, it was a breach of trust in *Piper* to his employer, for which he was liable; but prevented them from maintaining any action at law against the defendant, though perhaps they might have a remedy by a criminal prosecution for a conspiracy.

[292] The jury found a verdict for the plaintiffs.

Mingay, *Espinasse*, and *Lawes* for the plaintiffs.

Erskine and *Garrow* for the defendant.

Same day.

AITCHESON *against* SHARLAND.

Where the whole of the stamp-duty is imposed by one act of Parliament, a stamp on an instrument, if *ad valorem*, is sufficient.

ASSUMPSIT on a note of hand.

Plea of *non-assumpsit.*

When the note was produced in evidence, it appeared to be written upon a receipt stamp, but the stamp was a sixpenny one, which was the amount of the stamp necessary for the note in question.

Garrow objected to it; and cited *Robinson* v. *Drybrough*, *ante* 243.

Mingay, for the plaintiff, said, that this case was distinguishable from that; as that case went on the ground of the stamp there being compounded of several sums laid on by the acts of parliament

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AITCHESON *against* SHARLAND.

parliament at different times; whereas the present sum was an entire one laid on by one statute, as well in the case of receipts as notes.

Lord KENYON said, that he would admit it in evidence. His Lordship observed, that since the decision of the Court in the case of *Robinson* v. *Drybrough*, *ante*, he had reconsidered that case, and entertained some doubts respecting the propriety of that decision; but had not completely made up his mind on the subject.

Mingay and *Marryat* for the plaintiff.

Garrow for the defendant.

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VINEY *against* BARSS.

Tuesday, Feb. 24th.

Where a party defends a bill of exchange, on the ground that his acceptance has been forged, it is not admissible evidence that the party who negotiated such bill, had been guilty of other forgeries.

THIS was an action on a bill of exchange, drawn by one *Bricker* in his own favour, and by him endorsed to the plaintiff.

The defendant was sued as acceptor; and the defence was, that the acceptance was a forgery.

Bricker, the drawer, had been guilty of several forgeries, for which he had absconded.

Garrow for the defendant stated, that independent of positive evidence, which he would bring of different persons, who were acquainted with the defendant's handwriting, and who would swear that they did not believe the name subscribed to the note to be his; that he would also give evidence of other forgeries similar to the present, committed by the drawer of the bill.

Lord KENYON said, that he could not admit such evidence. His Lordship mentioned a similar matter having been ruled by Lord MANSFIELD, in the case of the forgeries by *Dadley*, of *Coventry*; but did not cite any case in particular.

Erskine and *Giles* for the plaintiff.

Garrow for the defendant.

END OF HILARY TERM IN THE KING'S BENCH.

IN

1795.

IN THE COMMON PLEAS AT WESTMINSTER, SAME TERM.

Saturday, Jan. 31st.

HARDY *against* MURPHY and WEDGE.

Using loud words in the street, though it is disorderly, is not an offence for which a party should be taken into custody; and if a person is so taken, an action of false imprisonment will lie.

THIS was an action of trespass and false imprisonment. Plea of Not Guilty.

The case in evidence was, that the plaintiff being on his return home, in the month of *July* preceding, in company with a person who was called as a witness, were talking loudly in the street: the defendant *Wedge* was a watchman, then on his stand, and called out to them to be quiet: the plaintiff answered, that he had a right to talk as he pleased in the street; the defendant told him, if he persisted, he would take them into custody; they did persist, and he took them and carried them to the watch-house, where the defendant *Murphy* was constable of the night. When they were brought before him, *Wedge* related the above transaction; and they by *Murphy*'s direction were charged in the constable's book with being disorderly and committed to *Tothill-fields Bridewell*.

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Le Blanc, Serjt. of counsel for *Murphy*, objected, that as the plaintiff had chosen to make this a joint trespass, and as it appeared that *Murphy* the defendant was admitted to be a constable, and had no concern in the transaction till the plaintiff was brought before him in that capacity, this evidence of the antecedent transactions was not admissible as it affected him.

EYRE, Chief Justice, ruled, that as he had adopted the acts of *Wedge*, the other defendant, it was therefore admissible to go into evidence of the whole transaction.

It was further given in evidence on the part of the plaintiff, that a person of the name of *Caulfield* had offered bail, but was refused.

In summing up to the jury, EYRE, C. J. said, that the defendants had made out no justification; that however using loud words in the streets might be disorderly, they were not of that description that could authorize a watchman to take a person into custody: that as to the constable, it was his duty to have inquired into

into the fact, and not to have taken the charge so generally, and that upon so much of the case the jury might find for the plaintiff; but as to the refusal of bail, they should dismiss that from their consideration, as by law a constable had no authority to take bail; and though it was sometimes practised in a case of this sort, it was connived at, being rather taking the party's word than demanding bail, and in many cases might be convenient and proper.

The jury found a verdict for the plaintiff, damages one penny. [296]

Bond, Serjt. and *Reader* for the plaintiff.

Adair, Serjt. and *Le Blanc*, Serjt. for the defendants.

LUCAS *against* NOVOSILIESKI.

Same day.

In an action for work and labour, that the defendant was in the habit of paying other workmen employed by the defendant in the same line of business regularly and at stated times, and that the plaintiff had been at such times with the other workmen, is admissible evidence.

THIS was an action of *assumpsit* for work and labour.

Plea of the general issue, and notice of set-off.

The case in evidence was, that the plaintiff, who was a brickmaker, had been for many years employed in that business by the defendant, who was an architect, and had received several sums of money on account during that period; and the action was brought to recover the balance, which the plaintiff by a witness proved the defendant had admitted.

It appeared however that the plaintiff had ceased to work for the defendant for upwards of two years preceding the bringing of the action.

Upon this last circumstance *Bond*, Serjt. of counsel for the defendant, in his opening much relied. He stated that the defendant was an architect of considerable eminence, employed in many public works, a man of large property, and regular in all his dealings; that it therefore was improbable that the plaintiff, if such debt was really due, would suffer such a length of time to elapse without demanding it; he also stated, that he would prove by evidence that the plaintiff, in common with the other workmen, [297] was paid his full week's wages every *Saturday* night.

The first witness who was called on the part of the defendant, proved that the several workmen employed in the brick-grounds of the defendant came regularly every *Saturday* night for their wages, and he presumed they were punctually paid, as he had never heard any of them complain; he had seen the plaintiff,

with

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Lucas *against* Novosilieski.

with the other workmen, waiting to receive his wages, but had never seen him paid.

It was objected by the counsel for the plaintiff, that this was not admissible evidence, as being "*res inter alios acta*," and no proof of any payment to the plaintiff.

Eyre, Chief Justice, held that it was admissible evidence, as grounding a presumption, that as the plaintiff worked under the same terms with the other workmen, that he was paid in the same manner as they were; and his Lordship accordingly admitted it.

What is opened by the counsel for one party as presumptive evidence in favour of his client against the other, cannot be examined into on cross-examination of his witnesses, if they have not been examined in chief as to the facts so stated in his favour.

The same fact was proved by several witnesses.

In cross-examining the defendant's witnesses, the counsel for the plaintiff asked one of them whether, during the time the plaintiff worked with the defendant *Novosilieski*, he was not a man in embarrassed circumstances, known to be distressed for money? and whether he had not many actions at the same time depending against him?

* This question was objected to by the defendant's counsel.

The plaintiff's counsel contended, that as the defendant's counsel in his opening had relied on the improbability of any debt being due to the plaintiff from the circumstance of his not having sued the defendant sooner, whom he had stated to be in good circumstances, and regular in the payment of his debts, that they might rebut the presumption by shewing that in point of fact the defendant was at that time much distressed for money, and not visible to his creditors.

[*298]

Eyre, Chief Justice, ruled that the question could not be asked. His Lordship said, that though the counsel for the defendant had asserted it, not having called any witnesses to the fact, it was not competent for the plaintiff's counsel to go into any evidence respecting it.

Clayton, Serjt. and *Espinasse* for the plaintiff.

Bond, Serjt. and *Lawes* for the defendant.

SITTINGS

1795.

SITTINGS AFTER TERM AT GUILDHALL,
coram BULLER, JUSTICE.

HART *against* M'INTOSH.

Thursday, Feb. 26th.

A party whose name appears on a bill of exchange, is not an admissible witness to impeach it in the hands of the indorser.

ASSUMPSIT by the plaintiff, as indorsee of two promissory notes, against the defendant as the drawer.

Plea of the general issue.

The defence was, that the notes had been given by the defendant to one *De Freize* on account of some illegal lottery transactions, and that they had been indorsed by *De Freize* to the plaintiff, who had notice of the transaction on which they were given.

To prove this transaction, *De Freize* was called by the defendant: his evidence was objected to on the ground that his name appeared on the note as the indorser, and the purport of his testimony was to defeat that security to which he had given credit by his indorsement. *Walton* v. *Shelly*, 1 *Term Rep.* 296., was cited. [299]

It was answered, that though that rule of evidence had been so established, yet that the Court of King's Bench had adopted a contrary rule, and now admitted an indorsee, or other party whose name appeared on the bill or note, to be a witness to prove any illegality in the transaction which might defeat the instrument, or the holder's title to it.

BULLER, Justice, asked, Had the rule so laid down in the King's Bench ever been adopted in the Common Pleas?

It was said, it had not; and *Le Blanc*, Serjt. said that EYRE, C. J. had been of opinion that the testimony of a witness under such circumstances was inadmissible.

BULLER, Justice, then said, that the rule of evidence had been so laid down by Lord MANSFIELD, and been so decided by the Court, and that he would adhere to it; and he accordingly rejected the evidence of the witness. [300]

Adair, Serjt. and *Wigley* for the plaintiff.

Bond, Serjt. for the defendant.

1795.

FRANCO *against* LINDO.

Same day.

Where the issue is whether the consideration of an annuity has been paid, it is not necessary to prove the consideration paid in money, or bank-notes.

THIS was an action of debt to recover the arrears of an annuity granted by the defendant.

The defendant pleaded, 1st, *Non est factum:* 2dly, As to part bankruptcy: 3dly, That in the memorial of the said annuity, registered under the statute 17 *Geo.* 3. as required by that statute, the consideration therein stated to have been paid had not been paid, so that the annuity was therefore void.

The two first issues were clearly proved for the defendant; the third issue was, whether the memorial had truly stated the consideration paid, it having stated 300*l.* as paid for it, whereas the defendant alleged that 142*l.* in money only was paid; the remainder having been paid up by a sum of money which *Lindo* the defendant had lost at play.

In proof of this issue the plaintiff proved the execution of the deeds, and that at the time there was paid to *Lindo* a number of bank-notes, the remainder in money, and by a cheque on a banker. *Lindo* said it was right at the time, but the exact sum was not proved.

[301] *Bond*, Serjt. objected: that the plaintiff had failed in proof of the issue: he said that the issue on the part of the plaintiff was, whether the consideration had been paid or not? that it was therefore incumbent on him to prove the payment, either in money or bank-notes, such as the decisions had settled to be taken as money in the payment of the consideration of annuities; but that the evidence here proved part to have been paid by a cheque on a banker; which could not be deemed either as money or notes within the decisions.

BULLER, Justice, over-ruled the objection: he said that the question on the record was not whether the memorial had so stated the consideration of the annuity, that the Court would set it aside for having been untruly stated; but whether the consideration had been paid? that this was a question of dry law, as to what was payment; and whether that payment was made in one way or the other, made nothing to the question; it was not necessary to prove payment by cash or bank-notes; a draft was payment under this issue; so if there had been a setting-off of debts, by one against the other, it would have been good payment; and it was in proof that *Lindo* had accepted the bank-notes,

notes, &c. in payment: he was therefore of opinion, that the evidence supported the issue. 1795.

Adair, Serjt. and *Wigley* for the plaintiff.

Bond, Serjt. for the defendant.

FRANCO *against* LINDO.

CORNEY *against* MENDEZ DA COSTA. [302]

Same day.

Where a person becomes indorsee of bills or notes given by an insolvent, in order to secure to his creditors their dividends under a composition, and he receives part of the insolvent's effects, in order to secure himself, he cannot take advantage of want of notice of non-payment by the insolvents.

ASSUMPSIT by the plaintiff as indorsee of a promissory note, drawn by *Da Costa*, *Matson*, and *Bible*, in favour of the defendant, and by him indorsed to the plaintiff.

The case in evidence was, that *Da Costa*, *Matson*, and *Bible* carried on the business of druggists in *London*; their affairs becoming embarrassed, a meeting of their creditors was called, where it was proposed to assign by deed all their effects to Trustees, for the benefit of their creditors.

A draft of a deed was accordingly prepared; but it afterwards occurred to the creditors that it would be a considerable saving of expense if the defendant, who came forward to assist them, would become the indorsee of notes at different dates, to be given to them for the amount of their respective compositions; which notes were to be drawn payable to the defendant, and by him were to be indorsed to the different creditors.

This proposition was acceded to, and the defendant became the indorser accordingly; and took effects of the insolvent's to the amount of the composition.

The note in question was one of the notes so given, and became due on the 6th of *December*: it was then not paid, nor any application made to the defendant till the 14th of *January* following.

Adair, Serjt. for the defendant, insisted that there was clearly laches; and that the plaintiff should be nonsuited. [303]

BULLER, Justice, said, that it was undoubtedly necessary that an indorser of a note should have notice of the default of the maker in payment. But that was only the case where there were effects of the indorser in the maker's hands, and that he might suffer from the want of such notice; but where there were no effects, no notice was necessary; the present was not the common case of the maker of a note making default, and no notice given: *Da Costa* the defendant made himself liable at all events, the creditors insisted on it; he therefore was solely liable, and being so, could not avail himself of want of notice.

 The

1795.

CORNEY *against* MENDEZ DA COSTA.

The plaintiff had a verdict.

Le Blanc, Serjt. and *Wigley* for the plaintiff.

Adair, Serjt. and *Marryat* for the defendant.

END OF HILARY TERM IN THE KING'S BENCH.

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HOME CIRCUIT.

LENT ASSIZE AT HERTFORD, CORAM ASHHURST, JUSTICE.

REX *against* TANNER et alt.

Tuesday, March 10th.

Where an indictment for a conspiracy to charge a parish under an order to be made by two justices, describing the one as an Esquire, and on producing the order, he is described as clerk, it is a fatal variance.

THIS was an indictment preferred by the parish-officers of *Enfield*, against the defendants, who were the parish-officers of the parish of *Elstree* in *Hertfordshire*, for a conspiracy, in procuring a marriage between one *Sarah White* then a *pauper*, and chargeable to the parish of *Elstree*, and one *Adam Blacknell*, whose legal settlement was the parish of *Enfield*, with a view to charge the last-mentioned parish.

The indictment charged, " That the said *Adam Blacknell* was a poor person, and unable to maintain himself and a wife, &c. that the place of his last legal settlement was, and now is, the parish of *Enfield*, &c. and in the second count averred, that the said *Sarah White*, therein called *Sarah Blacknell*, by an order of *Peter Newcome*, clerk, and *Benjamin Underwood*, Esq. two of his Majesty's justices assigned to keep the peace in and for the said county of *Herts*, had been removed to the said parish of *Enfield*, as the place of the last legal settlement of the said *Adam Blacknell*, to which parish she now continued chargeable, &c.

[305]

The defendant pleaded Not Guilty.

It was given in evidence by the prosecutors, that a marriage had taken place between the persons named in the indictment, accompanied with some circumstances of suspicion from the defendants having immediately after the marriage given to *Blacknell* a sum of five guineas; but it was proved that *Blacknell* was not a pauper chargeable to the parish of *Enfield*, but was a labouring man employed in husbandry, and received as much weekly wages as any person so employed.

It was further proved, that *Sarah White* had been so removed

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REX against TANNER et al.

to the parish of *Enfield* in the month of *June* preceding, where she had since been supported.

The order of removal was produced, and appeared to be under the hands and seals of *Peter Newcome*, clerk, and *Benjamin Underwood*, clerk, justices of the peace for the liberty of *St. Alban's*.

Shepherd for the defendants, upon this objected: that this was a fatal variance, the order stated describing Mr. *Underwood* as an Esquire, whereas he was *Benjamin Underwood*, clerk, and also describing the two magistrates as justices assigned to keep the peace in and for the county of *Herts*, whereas they appeared on the order of removal to be justices, not for the county at large, but for a district of it only, containing the liberty of *St. Alban's*.

[306]

Where the pauper at the time of the removal, appears to have been settled in the indicting parish, it shall not be presumed that he had acquired another at the time of the indictment.

ASHHURST, Justice, ruled, That this was a fatal variance; and the prosecutor's counsel abandoned that count.

Shepherd then objected: that the prosecutors had not made out another material averment in their indictment, namely, "That the said *Adam Blacknell* was and *now is* an inhabitant legally settled in the parish of *Enfield*;" that they had only proved by the removal, that *Blacknell* was at that time settled in that parish; but not that he was so at the time of preferring the indictment, to which time the words "*now is*" referred: that as the material charge in the indictment was, that the parish of *Enfield* was injured by being charged with the maintenance of the pauper at the time of the indictment preferred, that it was a material averment, which ought to be proved.

It was answered, by *Garrow* for the prosecution, that the parish of *Enfield* having received the pauper, was evidence that that was the place of the last legal settlement of *Blacknell*, and that it should be so presumed; that if the pauper had acquired a subsequent settlement, that the defendant should give that evidence, as it was an answer to the injury complained of by the defendant.

ASHHURST, Justice, ruled, that the evidence was sufficient, the removal having taken place so short a time before the preferring of the indictment, that it should not be presumed that the pauper had gained a subsequent settlement.

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Espinasse, on the same side, then objected: that the indictment

Unless a person is actually chargeable to the parish, an indictment will not lie for procuring a marriage between such person and pauper of another parish.

ment

*1795.

REX *against* TANNER et alt.

ment "averred that *Adam Blacknell* was a poor man, and unable to maintain himself and his family." That the evidence so far from establishing this fact, had expressly negatived it, it being in proof that *Blacknell* was a servant employed in husbandry, and capable of maintaining himself and his family: that the grievance upon which only the indictment could be supported, was that of burthening the parish of *Enfield*, by charging them with the maintenance of a pauper, to which but for the marriage they would not have been liable; but the evidence proved that no such grievance existed.

It was answered, that it being proved that he was a man merely employed as a servant in husbandry, he was in contemplation of law, as founded on the statutes, a person likely to become chargeable; and that supported the averment in the indictment.

ASHHURST, Justice, ruled, that the objection was fatal: his Lordship said, that the averment was a material one in an indictment of the description of the present, and had been in fact negatived by the evidence; that the *gravamen* was the bringing a charge on the parish, but that could not be supported by a proof of a marriage to a person who it was proved was capable of maintaining himself and his wife: that the inducing a person to marry under those circumstances was not an offence; as the indictments which had been maintained for injuries of this nature, had been for procuring a marriage where the man was a pauper, and actually chargeable to the parish; he therefore [308] added, that as the second count had been abandoned, and this count only remained, to which the objection was fatal, the defendants must be acquitted.

Garrow, *Const*, and *Minshull* for the prosecution.

Shepherd and *Espinasse* for the defendants.

END OF HILARY TERM, 35 GEO. III. 1795.

END OF PART SECOND.

CASES

ARGUED AND RULED

AT

NISI PRIUS,

IN THE

KING'S BENCH,

IN EASTER TERM, 35 GEORGE III. 1795.

THIRD SITTINGS IN TERM AT WESTMINSTER.

WEDDEL *v.* LYNAM and JONES.

Monday, May 10th.

Where an annuity has become void for a defect in the memorial, the grantee cannot maintain an action for money had and received to recover back the consideration-money, unless the annuity has been set aside by act of the Court, or the grantor has refused to re-execute valid securities, or to pay the annuity.

ASSUMPSIT for money had and received.

Plea of the general issue.

The action was brought to recover the sum of 570*l.*, which had been paid by the plaintiff to the defendants, as the consideration of an annuity granted by them for the life of *Jones*. The memorial of this annuity not having been duly registered in pursuance of stat. 17 *Geo.* III. the annuity was void under that statute; and the action was brought to recover back the consideration-money paid for it.

The plaintiff proved the payment of the consideration-money.

Lockhart, for the defendants, made two points: 1*st*, That supposing the plaintiff to be entitled to recover, the defendant was entitled, under the issue in the cause, to an allowance of all payments made on account of the annuity, and of all expenses incurred on it.

Lord KENYON ruled that he was so.

But 2*dly*, he contended, that this annuity having become void by the act of the plaintiff himself, and there being no evidence of

1795. — WEDDEL v. LYNAM and JONES.

any demand of the arrears of the annuity from the defendants; and a refusal by them to pay them, or any application to them to re-execute the securities, which they might have done, the plaintiff *could not raise a cause of action by his own act, or by reason of his own negligence or default.

[*310] *Erskine*, for the plaintiff answered, that the securities having become void by act of law, the statute having declared all annuities absolutely void, the memorials of which did not comply with the statute, the plaintiff was at liberty immediately to have recourse to his action to recover back the consideration.

Lord KENYON said, that it should not be in the power of the grantee of an annuity, by his own act or negligence, to rescind [311] the contract, and avoid the security given, at his option: That as there was no evidence of any application to the defendants, either for payment of the annuity or to re-execute the securities; and as the annuity had never been set aside by an act of the Court, he was of opinion that the action could not be maintained.

The counsel for the plaintiff then attempted to shew an application to the defendants to re-execute the deeds, so as to confirm the security; but failing in their evidence of it,

The plaintiff was nonsuited.

Erskine and *Const* for the plaintiff.

Lockhart for the defendants.

Vide *Shove* v. *Webb*, 1 *Term Rep.* 732, *Stratton* v. *Rastal*, 2 *Term Rep.* 366.

SITTING DAY AFTER TERM.

XIMENES v. JAQUES.

Where a paper purporting to be an agreement is entered into out of *England*, and an action brought on it, and the plaintiff declares on it as an agreement, it need not be stamped.

THIS was an action of *assumpsit*, brought to recover the sum of 100 guineas won from the defendant by the plaintiff, on a wager.

The wager was 100 guineas and the expenses of travelling, "that the plaintiff would not go 240 miles in 24 hours, in a post-chaise and pair of horses, being allowed to change post-chaises and horses as often as he pleased; the expenses not to exceed the usual expenses of travelling on the post-roads in *England*."

The plaintiff performed the journey in 21 hours and a half.

The plaintiff and defendant were officers on board the *Belvidere*

1795.

XIMENIS v. JAQUES.

dere East Indiaman; the wager was made at sea; and the paper containing the particulars of it was dated, "Ship *Belvidere*, *October* 2, *1793, long. 63, lat. 37;" and the agreement had been in fact there reduced into writing. [*312]

This paper was produced, and, not being stamped, was objected to, on the ground that the declaration being on an agreement, the paper containing that agreement should have an agreement stamp.

It was answered, that the agreement bore date at sea, and therefore not being made within the kingdom, a stamp was not required.

Lord KENYON was of that opinion and received it.

The plaintiff having proved his case, the defendant's counsel objected: that this was a wager on a horse-race, and so not recoverable.

Lord KENYON said, that this appeared upon the face of the record, upon which the defendant might move in arrest of judgment.

The plaintiff had a verdict.

Mingay and *Espinasse* for the plaintiff.

Garrow and *Wathen* for the defendant.

In the next term the defendant moved in arrest of judgment; when the Court held the wager illegal, and the judgment was accordingly arrested. Vide 6 *Term Rep.* 499. [313]

SITTINGS AFTER TERM AT WESTMINSTER.

Tuesday, May 28th.

HICKEY v. HAYTER, Administratrix.

In debt against the administratrix on a judgment obtained against the intestate in his lifetime, under the plea of *plene administravit*, the defendant may give in evidence that the plaintiff's judgment was not docketted, and that she had paid away all the effects to debts of an inferior degree.

DEBT on a judgment obtained against the defendant's intestate in his lifetime.

Plea of *plene administravit*, and issue thereon.

The plaintiff gave in evidence the inventory exhibited by the defendant in the spiritual court, by which she charged herself with effects amounting to 375*l*.

The defendant was proceeding to prove payment of debts by bond and other specialties, when

Erskine objected: that this could not avail the defendant, inasmuch as the plaintiff's debt arising by record, was of a superior

1795. — HICKEY v. HAYTER, Administratrix.

nature to those by payment of which she endeavoured to support her plea; so that, admitting the fact to be true, it would be a *devastavit*.

Vaughan, for the defendant, answered the objection, by stating that the judgment on which the plaintiff's action was founded, had not been docketted, and of course, under stat. 4 & 5 *W.* & *M.* *c.* 20. was not intitled to priority.

In reply to this, it was contended, 1*st*, That the clause of the statute requiring the docketting of judgments, in order to give them a priority, applied to the case of purchasers only, not to
[314] executors or administrators: 2*dly*, That as this was a good and subsisting judgment, and of course by law entitled to priority against special contract debts, and the defendant relied on the circumstance of the want of docketting as operating to postpone it, that she should have pleaded that the judgment on which the action was brought had not been docketted, and so have apprised the plaintiff of the matter meant to be contested.

Lord KENYON said, he was not aware of any judicial decision having taken place on the first point; but upon the words of the statute, they seemed to apply to the case of executors and administrators. And, as to the second point, he was of opinion, that as under the issue of *plene administravit*, the defendant might give in evidence payment of debts not of an inferior degree, without notice; and as the only notice the defendant could have had of this judgment was by its being docketted, he thought he could, under this plea, have the full benefit of the defence. His Lordship added, he would, however, suffer the plaintiff to take a
[315] verdict, with liberty for the defendant to move to set it aside, and enter up judgment of nonsuit.

Erskine and *Baldwin* for the plaintiff.

Vaughan for the defendant.

6 Term Rep. 384. In the following term the motion was made; and the defendant had judgment upon both points.

Wednesday, May 29th.

FINUCANE *v.* SMALL.

Where goods are bailed to be kept for hire, the bailee is bound to take the same care of them as he would of his own; and therefore if they are stolen by the bailee's servants, without gross negligence on his part, the bailee is not liable.

THIS was a special action on the case. Plea of not guilty.

The

The declaration stated, "That the plaintiff had delivered to the defendant a certain trunk, containing several articles, to be by him kept, for a certain reward to be paid to him by the plaintiff for the same; and that the defendant so negligently kept the trunk, that several of the articles which were contained in it were *stolen* and lost."

Small, the defendant, was an upholsterer; the plaintiff was an officer in the army; and being about to leave *London*, he sent his trunk to the defendant's house for safe custody; and he was to pay him 1*s.* *per* week for the house-room. When the plaintiff returned, he received the trunk; but the whole of the contents had been taken out.

When this case was opened, Lord KENYON said, he thought the declaration could not be supported: that it was an action against the defendant, charging him as a bailee. He could not [316] be charged in that capacity, when it appeared that he had taken as much care of the goods so delivered to him, as he had of his own; and the goods being stated in the declaration to have been *stolen*, that that did not seem to amount to a negligence sufficient to charge him with the loss.

It was answered by the plaintiff's counsel, that it was true a bailee could only be charged for negligence; but if a bailee took such little care of goods, or exposed them to the danger of being lost or embezzled from want of due care, and they were in consequence of that stolen, that was a species of negligence sufficient to charge him; and they asserted they could give evidence of such negligence.

To establish this fact, they endeavoured to prove, that, at different times, several articles of value had been stolen from the defendant's house, and that he had often complained of the dishonesty of his servants; and they then contended that this was sufficient.

Per Lord KENYON. To support an action of this nature, positive negligence must be proved. It has appeared in evidence in this case, that the goods were lodged in a place of security, and where things of much greater value were kept. This is all that it is incumbent on the defendant to do; and if such goods are stolen by the defendant's own servants, that is not a species of negligence of a description sufficient to support this action, [*317] inasmuch as he has taken as much care of them as of his own.

The plaintiff was nonsuited.

Garrow

1795.

FINUCANE v. SMALL.

Garrow and *Shepherd* for the plaintiff.

Erskine for the defendant.

Vide *Coggs* v. *Barnard*, 2 Lord *Raym.* 903. *Shields* v. *Blackburn*, *H Black. Rep.* 158. *Mytton* v. *Cock*, 2 *Stra.* 1099. *Com. Rep.* 134.

Same day.

SWEARS v. WELLS.

Where a creditor agrees to take part of his debt in hand and a security for the remainder at a future day, but which security is by mistake given on a wrong stamp, if he has taken the money to be paid in hand, he must notwithstanding wait till the time to be given by the security is expired.

ASSUMPSIT for goods sold and delivered, money had and received, and on an account stated.

Plea of *non-assumpsit*.

The plaintiff proved his declaration, and a sum due to him on balance of 4*l.* for which the action had been brought.

For the defendant a witness was called, who proved that on a settlement of accounts between the plaintiff and the defendant, a balance of 8*l.* was found to be due to the plaintiff. The defendant being unable to pay the whole of that sum, had applied to the plaintiff to take half the money down, and the remainder in a month; to which he consented. He then proved, that he had left for the plaintiff a check on a banker for 4*l.* and the defendant's promissory note for the remaining 4*l.* payable in a month; but this last appeared to have been on a wrong stamp. The plaintiff took the check for 4*l.* and received the money; and now brought his action to recover the remainder before the expiration of the month.

On this it was contended by *Mingay*, of counsel for the defendant, that it was a complete answer to the action, and entitled him to a nonsuit.

Erskine, for the plaintiff, answered, that the note being void, [318] as being written on a paper improperly stamped, the plaintiff was at liberty to sue on the unpaid balance of his former demand.

Lord KENYON said, that the whole agreement for payment of the money must be taken together: under it, the plaintiff had agreed to accept part in hand, and the remainder in a month. This was an entire contract; and if the plaintiff had been inclined to have receded from it, he should have rescinded the whole; but he had affirmed it by receiving part in money under the check, and now attempted to evade the latter part of the agreement, by which the defendant was allowed a month's time to pay the remainder: that although the note was given on a wrong stamp, that did not alter the nature of the agreement, as he should either have applied for another promissory note, or have

waited

waited till the month was expired; and having therefore brought his action before the month, he must be nonsuited.

1795.

SWEARS v. WELLS.

*Erskine and Bailey for the plaintiff.

Mingay for the defendant.

[*319]

Friday, May 22d.

YORK v. GRIBBLE.

When a person called as a witness for the plaintiff had employed the attorney, and made himself liable for the costs, a release from the attorney is sufficient to make him competent; nor is it necessary that he should have a release from the defendant, for he is not liable to him.

THIS was an action of *assumpsit*, brought to recover a sum of money claimed to be due for the board and lodging of the defendant's daughter.

To prove the case for the plaintiff, a witness was called, who was asked by *Garrow*, if he did not employ the attorney, and had not made himself liable to the costs?

Upon this, *Erskine* offered him a release from the attorney of all demands, on account of the action.

Garrow insisted, that this did not make him a competent witness, as he should be considered as liable to the defendant's costs in case he should have a verdict.

Lord KENYON said, that the release from the attorney restored him to competence, inasmuch as his engagement to the attorney, to indemnify him from costs, did not extend to make himself liable to the costs on the other side; neither was the attorney liable for them; so that the undertaking to the attorney was not to indemnify him against the defendant's costs. As, therefore, neither the witness, by virtue of his undertaking, or the attorney were liable for the defendant's costs, and the undertaking of the witness only went the length of indemnifying the attorney as far as he was liable, a release from the attorney, as offered, was fully sufficient to make him a witness.

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Erskine and *Coffin* for the plaintiff.

Garrow for the defendant.

Saturday, May 23d.

TURREL v. COLLET.

ASSUMPSIT for goods sold and delivered.

Plea of the general issue.

The action was brought to recover the value of a quantity of timber

Where a son had ostensibly appeared, as the proprietor and conductor of the business in a trade, not an extensive one, and the father, to whom the business really belonged, was superannuated and incapable of conducting it, held that the son was liable on contracts connected with the business.

1795. timber alleged to have been sold to the defendant, who was a carpenter.

TURREL v. COLLET.

The defence set up by the defendant was, that it was furnished to his father, and on his credit only, he being in the same line of business, and conducting it only for his father.

This defence was met by evidence on the part of the plaintiff, shewing, that the father was a man very far advanced in years, [321] and from old age and infirmity, without memory or understanding; and it was admitted that the son (the defendant) managed the business ostensibly.

Lord KENYON said, that under the circumstances proved, the defence set up was inadmissible. In great concerns, where there were many partners, as in the cases of great breweries, for example, notwithstanding the old age, infirmity, or insanity of one of the partners, the business might still be carried on for the benefit of the family; but in little businesses or concerns, such as the present, if the owner became devoid of memory or understanding, the business must necessarily be at an end. Here the defendant was the ostensible person, who conducted the business, and with whom the contract was made: the plaintiff, therefore, had a right to apply to him; nor should he be allowed to turn the plaintiff round, by setting up the credit as given to one whose intellectual derangement incapacitated him from conducting the most trifling concerns of life.

The plaintiff had a verdict.

Erskine and *Bailey* for the plaintiff.

Garrow for the defendant.

[322]

WITHNELL, Clerk, v. GARTHAM, Clerk.

Same day.

Where a right of election is given by an old deed to any number of persons, usage is admissible evidence as to its construction and meaning.

THIS was a feigned issue, for the purpose of trying, in the form of a wager, the right of nomination to the place of master of the grammar-school of *Skipton*, in *Craven* in *Yorkshire*.

In evidence, and on admissions made in the cause by both parties, it appeared that this school was founded and endowed by one *Urmston*, in the reign of *Edward* the Sixth, who by a deed regularly inrolled in Chancery, gave the nomination of the schoolmaster to the vicar and churchwardens of the parish of *Skipton*; which churchwardens were eleven in number; and if they neglected to nominate, in the case of a vacancy, a proper person

1795.

WITHNELL, Clerk, v. GARTHAM, Clerk.

person to succeed to the appointment of schoolmaster, within one month after a vacancy, he then directed that the right of nomination should devolve to *Lincoln-College, Oxford;* and in case *they* did not nominate a successor within one month, the right of nomination then devolved to the Dean and Chapter of *Saint Paul's*; on whose default of nomination in the same time, it reverted back to the vicar and churchwardens of *Skipton*, and their successors for ever.

On the death of the last schoolmaster, at a meeting of the churchwardens properly convened, together with the vicar, the plaintiff in the present action was nominated and elected by the votes of the vicar and six of the churchwardens.

Notwithstanding this election, *Lincoln-College* nominated the [323] defendant, contending, that under the original deed a majority could not elect; but that the consent of the whole body, that is, of the vicar and the eleven churchwardens, was necessary to a valid nomination by them.

The plaintiff proved the election as stated, and relied, 1*st*, On the matter of law; namely, that wherever an election was to be made by any number of persons, that the majority were in all cases to elect; and to that effect cited the case of the *King* v. *Beetson*, 3 *Term Rep.* 592: 2*dly*, That the usage had uniformly gone with the mode of election contended for, and that the majority had always elected.

Bearcroft, for the defendant, relied, that this being a case of a mere trust, that the concurrence of all were necessary; and cited *Co. Litt.* 112.; and that as to the question of usage, he contended, that evidence of it was inadmissible, as the whole question would arise on the construction of the original deed; that parties by their own construction of a deed could not enlarge their own powers, and therefore usage could establish nothing.

Lord KENYON said, that he was of opinion that an election by a majority, in the present case, was sufficient; but that, as to that point, he would reserve it; and that as to the usage, he had some doubt; but would admit evidence of it. He thought that [324] of ancient deeds, concerning which there was any doubt, evidence of usage was admissible; and he recollected some cases where Lord *Hardwicke* had been of the same opinion. *Attorney-General* v. *Parker*, 3 *Atk.* 576.

The vicar of the parish of *Skipton* was called as a witness.

A person who is a mere trustee to elect to any particular office, is an admissible witness to prove any fact respecting the mode of election.

Bearcroft

1795.

WITHNELL, Clerk, v. GARTHAM, Clerk.

Bearcroft objected to his testimony, he being one of the nominees, and so coming to support his right of nomination.

Lord KENYON said, it was no objection; he was merely a trustee; nor had he any interest which could disqualify him.

The counsel for the plaintiff then proceeded to evidence respecting the usage, and proposed to call a witness who was eighty years of age, to prove that during his time the nomination of the schoolmaster had been by the majority of the vicar and churchwardens; that he had himself been a churchwarden, and voted in the election; and they further offered his evidence as to the tradition from what he had heard from his ancestors, as to the mode of election in their time having corresponded with that which took place in his own.

This evidence, as far as respected the tradition, was strongly opposed by the defendant's counsel.

In the case of public right in proof of usage, traditional evidence as to it is admissible. *Aliter* in case of private rights.

Erskine, in reply, cited a case of Sir *Frederick Evelyn* against *Haynes*, on the Home Circuit at *Maidstone*, before Lord *Mansfield*, which was an action on the case, for an injury to certain works belonging to the plaintiff; and the plaintiff relied upon a right *founded upon usage, to go on the defendant's ground for the purpose of turning the water to these works; and he said that Lord *Mansfield* had admitted evidence of the usage.

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Lord KENYON said, he was inclined to think the evidence, as far as respected the tradition, not admissible; that the distinction was between public and private rights. In the case of public rights, tradition as to usage was admissible evidence, as in the case of questions respecting rights of way; but in the case of private rights, evidence of claim from usage was inadmissible. He therefore desired the counsel to confine the witness's evidence to what passed in his own time.

The plaintiff had a verdict, subject to the opinion of the Court of King's Bench, on the first point mentioned in the case, respecting the right of nomination.

Erskine, *Law*, and *Baldwin* for the plaintiff.

Bearcroft, *Chambre*, and *Wood* for the defendant.

In the next term the cause came on to be argued; when the Court agreed in opinion with the Chief Justice, and ordered the *postea* to be delivered to the plaintiff. Vide 6 *Term Rep.* 388, and cases *ibid.* cited.

Lord

1795.

Lord BARRYMORE, Administrator, *v.* TAYLOR.

Saturday, May 23d.

Letters of a party are evidence of themselves to prove a promise to pay, without producing those to which such letters are answers.

THIS was an action for money had and received, brought by the plaintiff, as administrator of his brother, the late Lord *Barrymore*.

The defendant pleaded first the general issue; *2dly*, a set-off of 400*l.* being so much money paid under and in pursuance of a judgment on a foreign attachment, at the suit of one *Grant*, on account of a debt due to him by the late Lord *Barrymore*.

On these pleas two issues were taken.

The action was brought to recover the balance of a sum of 500*l.* which had been paid by the late Lord *Barrymore* as the part purchase of a box at the Opera-house, of which the defendant was the proprietor. The agreement for the purchase had been, by consent of both parties, rescinded; and the money so paid not having been paid back in Lord *Barrymore*'s lifetime, the present action was brought to recover it.

To prove the first issue, the plaintiff called a Mr. *Seton*, who had been attorney for the late Lord *Barrymore*, and who, by his direction, had applied by letter for the money. He produced letters from *Taylor*, the defendant, containing frequent promises to settle the business, and pay the money.

Garrow, for the defendant, objected to the reading them, unless the letters to which they were answers were produced, as they would explain the transactions, and account for the promises made to settle. [327]

Lord KENYON said, that there was no rule of law that required such evidence; that the letters to which these were answers were in his client's hands; and if he thought them necessary to explain the transaction, he might produce them, to do away the effect of the promise: that otherwise it was only matter of observation, but no objection, in point of law, to their admissibility.

They were accordingly read in evidence.

To prove the second issue, the defendant called a witness of the name of *Grant*. He had been the garnishee under the foreign attachment, and had obtained the money.

His competency was objected to.

The garnishee, under a foreign attachment, who has received the money, is not an admissible witness to prove the regularity of the proceedings, or the justice of his demand. Foreign attachment is a bad plea, either where the parties are not both resident in *London*, or where the plaintiff is an executor or administrator. Q.

Lord

1795.

LORD BARRYMORE, Administrator, v. TAYLOR.

Lord KENYON ruled, he was clearly inadmissible, as he came to support his own proceedings, under which he had obtained the money. He therefore rejected him.

His Lordship then asked, if at the time of the attachment made, the parties were resident in *London?* and being answered in the negative, he added, That this plea could not be supported, as, by law, the process of foreign attachment was confined to *London* only. But, besides that, his Lordship observed, that on another ground he thought the plea not tenable: the plaintiff was an administrator; and if it was allowed that the assets of an intestate could be attached, it seemed to him that it would break in upon the course of administration, as by such means a creditor might secure a priority, to which, otherwise, by law, he was not entitled; and therefore could be allowed or admitted.

His Lordship therefore directed the jury to find for the plaintiff; which they did.

Erskine and *Wood* for the plaintiff.

Garrow and *Lawes* for the defendant.

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Same day.

DIGBY v. STEDMAN et alt.

To prove the delivery of goods in the shop of a trader, an entry made in his books, though not by the witness, under what circumstances it may be evidence.]

TROVER for a gold watch.

Plea of the general issue.

The case in evidence was, that the defendants were watch-makers and jewellers; and the plaintiff having delivered to the defendants the watch in question, to be repaired, while it was in their hands, he sold it to a gentleman of the name of Sir *J. Murray*, and ordered them to deliver it over to him, when it was finished. The defendants insisted that they had so delivered it, pursuant to his orders. This was denied by the plaintiff; and the present action brought to recover it.

Sir *J. Murray* was called, and swore positively that he had never received it.

[329]

The defendants called their shopman to prove the delivery; and he produced the shop-books, in which was an entry of the delivery to Sir *J. Murray* on a certain day.

The witness was asked if the entry was in his own hand-writing, or made in his presence. He answered, that they were not, but in the hand-writing of his master (one of the defendants,) and not made in his presence; but that was the usual mode

 of

of making the entries, and that he had seen them in a short time after they had been made; and that he had himself seen the watch delivered to Sir *J. Murray*.

Mingay, for the plaintiff, objected: that this evidence was inadmissible, inasmuch as the shop-books of a trader were only admissible evidence where the entries were made in the hand-writing of the clerk, who was called as a witness to prove them.

Lord KENYON said, that the entry in the book was brought to corroborate the testimony of the witness, who had himself seen the delivery; that the entry should regularly be in the hand-writing of the witness; but where the entry was made in the hand-writing of another, and the witness saw it soon after it was made, and the entry had corresponded with what he had himself then observed, that such was tantamount to an entry made by himself, and was therefore admissible.

Mingay and *Agar* for the plaintiff.

Erskine and *Garrow* for the defendants.

Vide *Cooper* v. *Marsden*, ante 1 *Pitman* v. *Maddox*, *Salk*. 690. *Price* v. Lord *Torrington*, *Salk*. 285.

SITTINGS AFTER TERM AT GUILDHALL.

SMITH et alt. v. SIMMES.

Wednesday, May 28th.

In an action by the trustees of an insolvent estate, to recover part of the property, letters of the insolvent are not evidence, where he himself can be produced.

ASSUMPSIT for money had and received, with the usual counts.

Plea of the general issue.

The plaintiffs were the trustees under a deed of assignment for the benefit of his creditors, made to them by one *Whitely*, who had become insolvent.

The action was brought to recover the balance of the amount of a bill of exchange for 500*l*. which was part of the property of *Whitely*.

This bill had been sent from the *West Indies*, in a letter directed to the plaintiffs as trustees of *Whitely*. *Whitely* had been authorized by the trustees to receive all monies, &c. belonging to his estate, and in that manner had become possessed of the bill of exchange in question, having opened the letter and taken out the bill.

After

1795. SMITH et alt. v. SIMMES [*331]

After he had so become possessed of it, he sent it to the defendant, requesting him to advance 50*l.* on it on his account. The defendant did so, and took the bill; and there was no evidence that *the defendant at that time knew the situation of *Whitely*'s affairs.

These transactions were so far admitted by both parties; and the plaintiffs offered to allow the defendant the 50*l.* he had so advanced. The defendant contended, that he had advanced further sums on the same security of the bill which had been so deposited, to its full amount; and therefore insisted on his right to retain the whole.

To prove that he had so advanced this money to *Whitely*, to the amount claimed, the counsel for the defendant proposed to read *Whitely*'s letters.

Garrow for the plaintiffs, objected to this evidence; for that as *Whitely* was no party to the record, that his letters should not be admissible evidence against the plaintiff; but that at all events, if the defendant wanted to shew that he had advanced money on the credit of the bill, that *Whitely* should himself be called, and proof of that fact not be made out by letter where the person himself could be produced.

It was answered by *Erskine*, for the defendant, that the plaintiffs were the representatives of *Whitely*, and claimed all their rights to the property, as well as their right to sue through him; that he was therefore to be considered, though not nominally, yet as really the plaintiff; and that his letters were therefore admissible.

Lord KENYON ruled, that the evidence was inadmissible; that it was not the best evidence, as *Whitely* himself might be called to prove the transaction, and state how the money had been advanced.

[332] *Whitely* was not produced; and the plaintiff obtained a verdict.

Garrow and *Chambre* for the plaintiff.

Erskine and *Shepherd* for the defendant.

Friday, May 29th.

Staples *v.* Okines.

The acceptor of a bill of exchange is a good witness to prove that he had no effects in his hands of the drawer's, when the bill was drawn.

ASSUMPSIT on a bill of exchange drawn by the defendant on one *Jesson*, two months after date. *Jesson* accepted the bill, but had become insolvent; and the action was against the defendant as the drawer.

The defence was, want of notice of non-payment by the acceptor.

This was answered by the plaintiff's counsel, stating that there were no effects in the acceptor's hands belonging to the drawer, so that notice was unnecessary.

To prove this fact, *Jesson* the acceptor was called as a witness.

Garrow, for the defendant, objected to his testimony, on the ground that, on the face of the bill he stood liable by his acceptance; and that as the object of his testimony was to charge the defendant the drawer, and thereby to discharge himself, that he was inadmissible.

It was answered by the plaintiff's counsel, that the testimony of the witness could have no such effect; that he was not discharged by the present verdict as to his acceptance, but in fact still remained liable to the drawer of the bill by reason of it, the acceptance being evidence of a debt from him to the drawer; neither could the evidence he gave in this action have any effect in any action to be brought against himself.

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Symonds v. *Parminster*, 1 *Wils.* 185.

Lord Kenyon was of opinion, that the evidence was admissible.

Where a bill is drawn, and the drawee is in fact then indebted to the drawer, but at the time informs the drawer that he is unable to provide for the bill, and it is understood between them that the drawer was to provide for it, if it is not paid when due, the drawer must have notice, or he is not liable.

On his examination, he said, that when the bill was drawn upon him by the defendant, he was, in fact, in debt to him to above the amount of the bill; but that he then represented to the defendant that it would not be in his power to provide for the bill when it would become due; and that it was therefore then understood between the defendant and him, that he (the defendant) should provide for it.

Erskine, for the plaintiff, upon this evidence contended, that though notice of non-payment by the acceptor, had, in fact, not been given to the defendant,—that where it was understood, between the drawer and acceptor of a bill, that the drawer was himself to provide for the bill when it became due, that the acceptor having never undertaken to the drawer to provide for it, was the same as if there were no effects in the hands of the acceptor, and that notice was unnecessary, as amounting to a waiver

of

1795. — STAPLES v. OKINES.

of it, or at least, the understanding between them tantamount to notice of non-payment by him.

Lord KENYON said he would not fritter away the distinction respecting notice in cases of this sort; and as the law was general, only exempting the party from the necessity of giving notice where the drawee had no effects, and as here the drawee was in-
[334] debted to the defendant, on whom the bill was drawn, and so in fact had effects in hand; and if he had had effects in hand when the bill became due, would have taken it up, he was of opinion that notice was necessary; and he therefore directed the plaintiff to be called.

Erskine and *Baldwin* for the plaintiff.

Garrow for the defendant.

Saturday, March 30th.

WILSON et alt. Assignees of WARNER, v. NORMAN.

Where the act of bankruptcy is the absconding to avoid being arrested, general proof of his so absconding is sufficient, without shewing any writs to have actually issued.

ASSUMPSIT for money had and received by the plaintiffs, as assignees of *Warner*, a bankrupt.

Plea of the general issue.

The act of bankruptcy was, the absenting himself from his dwelling-house to avoid being arrested.

A witness proved that *Warner*, the bankrupt, had come to his house, in order to conceal himself, representing to the witness that there were several writs out against him, and that he kept out of the way, in order to prevent his being arrested.

It was objected by the defendant's counsel: that it was incumbent on the plaintiff to shew that some writs had actually issued, and were at the time out against the bankrupt; and it was com-
[335] pared to the case of an act of bankruptcy, from the trader having given orders to have himself denied; in which case it was necessary to shew, in case such trader was denied, that the person who called was actually a creditor.

Lord KENYON over-ruled the objection.

Erskine, *Gibbs*, and *Symonds* for the plaintiffs.

Mingay and *Marryat* for the defendant.

Vide S. C. *ante* 154.

FEMINGS

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FEMINGS *v.* JARRAT, Executor of PEAT, deceased.

Same day.

If a person sets up in himself a colourable title to the possession of the goods of the deceased, though he may not be able to establish a completely strict and legal title, it is sufficient to exempt him from being charged as executor *de son tort.*

ASSUMPSIT for goods sold and delivered to the defendants.

Plea of, 1st, *Ne unques executor.* 2d, No assets come to the hands of the defendant.

The case in evidence was, that *Peat*, the deceased, in his life-time, being the owner of a certain ship, and having occasion for sails for her, they had been furnished by the plaintiff, who was a sail-maker; and they were not paid for at the time of his death; that after the death of *Peat*, the defendant had possessed himself of the ship, on which he claimed a lien; and the object of the action was to charge him for the price of the sails, as executor *de son tort.*

The delivery and price of the sails was proved.

Mingay, for the defendant, stated his defence to be, that every interference of a person with the effects of a person deceased would not make him executor *de son tort*, provided it was such interference as was consistent with a legal right of possession which he claimed; that as to the possession of the ship on the present occasion, the defendant had been the ship's husband, and had taken possession of the ship by virtue of a *bona fide* assignment made to him by *Peat*, the deceased, in his lifetime. [336]

He then gave in evidence the instrument by which the defendant was appointed the ship's husband. He afterwards proved, that the captain having possessed himself of the ship in *Peat's* lifetime, a suit had been instituted in the Admiralty by *Peat*, at the defendant's expence, to recover her; and in consideration of that and many other engagements the defendant was then under on account of the ship, and of 250*l.* paid, *Peat* had by his deed, dated 24th *September*, 1791, assigned the ship to the defendant.

On this evidence, Lord KENYON said, he was of opinion, that the plaintiff had made out a *prima facie* legal title to the possession as he claimed it, sufficient to exempt him from being charged as executor *de son tort.*

Erskine, for the plaintiff, insisted that the mere proof of the deed of assignment was not sufficient, as he ought to shew a completely legal title: That Lord *Hawksbury's* act having made an

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FEMINGS *v.* JARRAT, Executor of PEAT, deceased.

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indorsement of the grand bill of sale necessary, such ought to be shewn.

*Lord KENYON said, that in a question of the nature of the present, he would not inquire whether the plaintiff had conformed to all the requisites necessary to complete his title: that if the defendant came to the possession by colour of a legal title, though he had not made out such title completely in every respect, he should not be deemed an executor *de son tort*.

The plaintiff had a verdict.

Erskine, *Gibbs*, and *Baldwin* for the plaintiff.

Mingay and *Reader* for the defendant.

Vide *Read's* Case, 5 *Co.* 33. *Anon. Salk.* 313.

BECKFORD *v.* JACKSON.

Where the plaintiff declares on a deed, and to avoid profert, that it is lost by time and accident, what evidence will be sufficient, on issue joined, on the existence of the deed.

DEBT on an annuity-deed, dated the 9th of *May* 1781.

The annuity was secured on an estate in the island of *Jamaica*; and the action was brought to recover the arrears.

The declaration stated the deed; but further, "that it had been "lost or mislaid," so that no profert could be made.

The defendant pleaded, 1*st*, *Non est factum*. 2*dly*, That the deed was not lost or mislaid; upon both of which pleas issues were joined.

To prove the deed, an exemplification of it from the court in *Jamaica*, under seal of the court in *Jamaica*, was produced.

It was admitted without objection.

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To prove the execution and the loss of the deed, a witness was called.

He proved he had seen the deed executed by the defendant. Being questioned as to the loss, he said, that it was common in the *West Indies* to execute but one part of the deed, and no counterpart; so that he believed there was no counter part of the deed in question in existence: that there being a registry of all deeds and conveyances in the island of *Jamaica*, deeds were not kept there by the owners with much care, as the parties might have recourse to the registry for a copy, which they could have under the seal of the court; and that when registry was made, the original deed was frequently left with the secretary.

Being asked when he had seen the deed, he answered, that he had seen it in the hands of one ——.

The

The plaintiff could not prove that he had made any inquiry respecting it, either from the secretary, or the person the witness had mentioned.

Lord KENYON said, that to prove this issue, it was necessary to give evidence of a search where the deed probably might have been found; that not having done so, they had not maintained their issue, and that the plaintiff should be called.

Gibbs and *T. Walton* for the plaintiff.

Erskine for the defendant.

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BIRD *v.* THOMPSON.

Monday, June 1st.

The captain of a ship is not an admissible witness to disprove barratry, in an action on a policy of insurance, by shewing that the barratrous acts were done by consent and direction of the owners, without a release from the underwriters.

THIS was an action to recover the loss on a policy of insurance on a ship and goods at and from the *Bahama* islands to *Liverpool.*

The policy was admitted, and the interest as averred in the declaration.

The loss was by barratry.

It was proved on the part of the plaintiff, that the ship had taken on board a letter of marque: that she had chaced and captured several ships during her voyage, out of her course; and that she afterwards went to *Bermudas,* where she was lost.

To prove that this was done by the consent and with the knowledge of the owners, the captain of the vessel was called by the defendant.

Erskine, for the plaintiff, asked if he had a release; and being answered in the negative, objected to his competency.

The counsel for the defendant contended that it was unnecessary, as the underwriters had no claim against him.

Lord KENYON said, that a release was certainly necessary, to render his testimony admissible. His Lordship said, that if the plaintiff obtained a verdict, he conceived that the defendant might maintain an action against him, the loss having arisen from the barratry, which was his act; for though he knew of no action of that sort ever having been brought, yet he conceived, [340] that wherever a man acted contrary to his duty, whereby another received a damage, or was rendered responsible or liable to damages, he might maintain an action *ex delicto* against the person who had so subjected him. That in the present instance the captain had a duty to perform, as well to the underwriters

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as to the owners and freighters; which duty he had violated, and thereby subjected the underwriters to the amount of the policy, if he had, as was asserted, been guilty of the barratry imputed to him.

His Lordship rejected his testimony, and the plaintiff recovered.

Erskine, *Garrow*, and *Giles* for the plaintiff.

Law and *Gibbs* for the defendant.

Nutt v. *Bourdieu*, 1 *Term Rep.* 323.

Wednesday, June 3d.

MALTBY, Assignee of DUROUVERAY, a Bankrupt, v. CHRISTIE.

What allowance an auctioneer is entitled to.

THE declaration in this case stated, that the defendant, being an auctioneer, the bankrupt, before his bankruptcy, had delivered to him a certain quantity of *French* plate-glass to sell; and the action was brought to recover the sum for which it had been sold.

Plea of *Non assumpsit*, and a set-off.

The only question in the cause was, whether the defendant was entitled to an allowance of a *per centage* of seven and a half
[341] on the price of the goods, exclusive of all expences of warehouse-room, catalogues, &c. which he claimed.

This claim was said to be founded on the usage of trade; such an allowance being always claimed by the defendant.

Lord KENYON said, that the only ground upon which it could be supported was private agreement; but that there was no colour for claiming in any declaration that could be framed, any sum beyond the fair *quantum meruit* for such labour.

Erskine, for the defendant, contended, that if there was a particular custom of payment for work and labour, a person, knowing of such custom, was bound to abide by it, and to render the compensation claimed under it.

Lord KENYON delivered no opinion upon this point; but permitted the defendant to go into evidence of the custom.

A witness proved the allowance; and that it was considered as an allowance common and well known, on account of the extraordinary risque, trouble, and expence attending the sale. Being asked who would be liable, in case the goods were broken or hurt, the question was objected to, as being a question of law, the defendant's

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MALTBY, Assignee of DUROUVERAY, a Bankrupt, *v.* CHRISTIE.

fendant's counsel having contested, that in such case the loss would fall on the auctioneer.

Lord KENYON said, he was of opinion that the defendant was * bound only to take due care, such as he would do of his own goods; so that for a loss arising from misfortune, or unavoidable accident, he was not liable.

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The cause was referred to arbitration.

The plaintiff, in proving his case, having found some difficulty in proving the bankruptcy of *Durouveray*, *Garrow* produced the defendant's catalogues of the sale of the glasses in question, in which the goods were stated to be "the property of *Durouveray*, a bankrupt."

In an action for goods of a bankrupt, against the person who sold them, an advertisement of the defendant's, describing them as the goods of the bankrupt, precludes him from disputing the bankruptcy.

Lord KENYON held, that this superseded the necessity of going through the different steps, the defendant being thereby precluded from disputing the bankruptcy of *Durouveray*.

Garrow and *Wigley* for the plaintiff.

Erskine and *Gaselee* for the defendant.

END OF EASTER TERM IN THE KING'S BENCH.

IN THE COMMON PLEAS AT WESTMINSTER, SAME TERM.

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CAMPION *v.* BENTLEY, Administrator of SAMUEL BENTLEY, deceased.

Thursday, April 29th.

THIS was an action of *assumpsit*, brought to recover the amount of a promissory note for 49*l.* 19*s.* drawn by the intestate *Samuel Bentley*, in favour of the plaintiff.

Where an executor pleads a judgment, and *ultra plene administravit*, and there is a replication of *per fraudem*, the party who has obtained that judgment is an inadmissible witness to prove it to be for a good and *bonâ fide* consideration.

The defendant pleaded a retainer of 23*l.* for a debt due to himself by the intestate, and a judgment at the suit of one *Alice Bentley* for 70*l.* recovered in the King's Bench, and *Nil assets ultra.*

The plaintiff, by his replication, denied that the sum of 23*l.* claimed by the administrator, was justly due; and as to the judgment, that it was obtained and kept on foot by fraud.

The defendant, by his rejoinder, took issue on these two points.

In

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CAMPION v. BENTLEY, Administrator of SAMUEL BENTLEY, deceased.

In support of the judgment, it became necessary to shew that the debt was a *bonâ fide* debt due by the intestate to *Alice Bentley*, who was his mother; and that she had authorised the proceedings to judgment, and meant to claim that debt against her son's estate.

The counsel for the defendant proposed to call *Alice Bentley* [*344] * herself, to prove that the debt was a fair one; and the circumstances above stated, on the ground that as she was not interested in the issue then depending between the parties, she was an admissible witness.

EYRE, Chief Justice, rejected her testimony. He said, that though not a party on the record, she was certainly interested in the event of the trial; as by establishing the validity of her own debt, she made good her priority of claim to be paid out of the assets of the intestate; and that this was such an interest as rendered her incompetent.

She was afterwards admitted by consent.

Where an executor or administrator pleads judgments recovered, and so *plene administravit*, if the plaintiff falsifies any of the judgments, he is entitled to a verdict.

In summing up to the jury, his Lordship told them that they were to inquire whether the defendant had pleaded a false plea or not; and for that purpose to consider if either of the demands set up against the intestate's estate was fraudulent or not; and if they believed either to be unfounded, that they should find a verdict for the plaintiff.

The jury found for the plaintiff.

Bond, Serjt. and *Lawes* for the plaintiff.

Cockell, Serjt. and *Espinasse* for the defendant.

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CHARLWOOD et alt. v. BERRIDGE.

An attorney shall not be allowed to use the name of his client, to try whether he is entitled to the costs of the declaration, where the defendant has paid the debt.

ASSUMPSIT for goods sold and delivered

Plea of the general issue.

The plaintiffs proved the value of the goods, and the sale of them to the defendant. The value was between six and seven pounds.

The case relied upon and proved, on the part of the defendant, was, that he had accepted a bill of exchange in favour of the plaintiffs for this debt; which not being paid when due, he was on *Saturday* the 1st of *November*, at nine o'clock at night, served with a *clausum fregit*, at their suit, returnable the first return of *Michaelmas* term: that on the *Monday* forenoon following, he sent

sent to their attorney to settle that action, but the attorney declined giving in a particular of the debt and costs; then alleging, that he did not at that time know the amount of the debt, and desired the defendant to send again on the morrow: that the defendant accordingly, the next day, sent a person to the plaintiffs' attorney, with a cheque on a banker for 7*l.* 10*s.* which sum was meant to pay the debt and costs then incurred. The attorney charged three guineas for the costs of the action, alleging, that he was entitled to charge for a declaration; to which charge the defendant objecting, he was referred by the attorney to the plaintiffs themselves. It further appeared in evidence, that the defendant then went to the plaintiffs, and returned with one of them to their attorney, when the plaintiff took the cheque from the defendant, and delivered him up the bill of exchange which he had before given. [346]

Upon this, the counsel for the plaintiffs called their attorney, who deposed, that at the time of taking the cheque and delivering up the bill, the plaintiffs had paid him three guineas for the costs, and that the defendant had promised the plaintiffs to pay them the sum of two guineas (for which this action was brought) by installments of 5*s.* *per* week; that he had actually drawn the first count of the declaration on the bill (the others being printed forms) on the *Sunday;* and that on consulting the prothonotary on occasion of the dispute, he had been informed that he was entitled to charge for the declaration.

EYRE, Chief Justice, (after consulting an experienced practiser then in Court, on oath, as to the allowance of the costs of the declaration in such cases, who swore, that where the defendant applied to settle an action so soon as the day after being served with process, the prothonotary never allows the costs of the declaration) said, I hold, that even though the defendant made the promise alleged, he shall not be bound by it; for although, had it been to that effect, the plaintiffs' attorney might have recovered his costs in a proper action, yet he shall not be allowed to use the name of his clients, to try whether he is entitled to the costs of a declaration or not. The plaintiffs must be called.

Adair, Serjt. and *Wigley* for the plaintiffs. [347]
Cockell, Serjt. and *Jervis* for the defendant.

SITTINGS

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SITTINGS AFTER TERM AT GUILDHALL.

Monday, June 1st.

GUILLOD *v.* NOCK.

Where the plaintiff declares on an agreement, and the defendant pays money into Court generally, it admits the agreement so far that it may be given in evidence, without farther proof.

THIS was an action of *assumpsit*.

Plea of the general issue.

The action was founded on a special agreement, stated in the declaration, by which the plaintiff had sold to the defendant a certain quantity of walnut-timber, at a certain price, according to admeasurement.

The defendant had paid money into Court generally.

The plaintiff produced the agreement; but no witness was called to prove it, nor was the paper stamped upon which it was written.

Cockell, Serjt. took two objections to the agreement being so admitted in evidence: 1st, Because it had not been proved by the subscribing witness; 2dly, That it was not properly stamped, even admitting that it could be given in evidence without proof of its execution.

It was answered by the plaintiff's counsel, that no further proof was necessary, and that it was complete evidence as offered. As to the proof of the execution, they insisted that the defendant,
[348] by paying money into Court generally, had admitted the agreement as stated in the declaration, and that therefore no proof of it was necessary. And as to the stamp, they contended, that it was an agreement for the sale of goods, and therefore was good without a stamp, under the proviso of the stamp-act; and *Gutteridge* v. *Smith*, *H. Blackstone's Rep. Mich.* 34 *Geo.* III. was cited as in point.

EYRE, Chief Justice, said, that the case cited by the plaintiff's counsel had been so decided by the majority of the Court of Common Pleas, and that he therefore was bound by the decision so made, to receive the agreement offered, without further proof; and he admitted it accordingly.

Adair, Serjt. and *Lawes* for the plaintiff.

Cockell, Serjt. for the defendant.

END OF EASTER TERM.

CASES

CASES

ARGUED AND RULED

AT NISI PRIUS,

IN THE

KING'S BENCH;

IN TRINITY TERM, 35 GEORGE III. 1795.

LAST SITTINGS IN TERM AT GUILDHALL.

ANONYMOUS.

Tuesday, June 23d.

On the issue of a tender, how far a tender to a servant is sufficient.

ASSUMPSIT for work and labour, with the usual counts. Plea of tender, upon which issue was joined.

The evidence for the defendant on the tender was, that being indebted to the plaintiff in the sum claimed by the action, he had sent the money by his maid-servant to the house of the plaintiff. She swore that she carried it to the plaintiff's house, and having seen a servant there, who informed her that her master was at home, she delivered the money to that servant to be delivered to her master; that the servant took it, and went into the house, as [350] she supposed, to deliver it to the plaintiff, and returned with an answer that he would not receive it, but that she must go to his attorney.

Erskine objected: that this was not a legal tender, it not being made to the party himself, of which there was not any evidence whatever.

Lord KENYON said, that in the common transactions of life, this kind of intercourse, by the intervention of servants, must be allowed; and that if money was so brought to the house of the plaintiff, and delivered to his servant, who retired, and appeared to go to the master, it was evidence to be left to the jury, from which they might infer that a tender was made.

The

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—
ANONYMOUS.

The defendant had a verdict.

Erskine and *Baldwin* for the plaintiff.

Mingay for the defendant.

Same day.

PRECIOUS *v.* ABEL.

Where articles are furnished to the use of a master, though the servant was by agreement to provide them, the master is liable to the tradesman who furnished them.

THIS was an action for work and labour by the plaintiff, who was a smith and farrier.

Plea of the general issue.

The work done was the shoeing and physicing the defendant's horse.

The defence was, that the defendant, by an agreement with his groom, allowed him five guineas a year, for which he was to keep the horses properly shod, and furnish them with proper medicines when necessary.

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Lord KENYON said, that it was no defence to the action, unless the plaintiff knew of this agreement, and expressly trusted the groom. That if the servant buys things which come to his master's use, the master should take care to see them paid for; for a tradesman has nothing to do with any private agreement between the master and servant.

The plaintiff had a verdict.

Erskine and *Baldwin* for the plaintiff.

Mingay for the defendant.

SITTINGS AFTER TERM AT WESTMINSTER.

ALLESBROOK *v.* ROACH.

Where the defence to a bill of exchange is forgery, the jury shall be allowed to decide on comparison of hands, by comparing the bill in question with other acceptances admitted to be the defendant's.

CASE on a bill of exchange, by the indorsee against the acceptor.

The defence was, that the handwriting to this acceptance was a forgery.

To prove the acceptance, the plaintiff produced a witness, who said that he had seen the defendant write three times; from whence, on inspecting the bill, he concluded it was his hand writing, which he swore he believed it to be.

Another witness was called, who had in his possession five bills of the defendant's, which had been proved under his commission, he having been a bankrupt. Upon being shewn the bill upon which

which the action was brought, he said that he did not think the name to the acceptance was the defendant's handwriting.

[*352] * Upon comparing these bills with the acceptance of the bill in question, they were evidently dissimilar.

For the defendant, a witness was then called, who said that he had frequently seen him write, and was familiarly acquainted with his hand writing; and on the bill being shewn to him, he said he had no doubt that it was not the handwriting of the defendant.

The counsel for the defendant then offered to the jury several other bills, admitted to be of the defendant's handwriting, and desired the jury to compare them, and to draw their own conclusion.

This was objected to.

Per Lord KENYON. Some Judges have doubted of the policy of that rule of evidence respecting the allowing of the jury to judge by comparison of hands, because often at a distance from the metropolis, the jury are composed of illiterate men, incapable of drawing proper conclusions from such evidence. For my part, I have been always inclined to admit it; and shall do so in this case.

The jury found a verdict for the defendant.

Garrow and *Holroyd* for the plaintiff.

Erskine and *Mingay* for the defendant.

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LEADER v. BARRY.

Saturday, June 27th.

A copy of the register of a foreign chapel is not evidence to prove a marriage; but in every civil case, except for crim. con. general reputation, the acknowledgement of the parties, and reception by their friends as man and wife, is sufficient proof of a marriage.

THIS was an action of *assumpsit* for 411*l.* for a coachmaker's bill.

The defendant pleaded *non assumpsit* and coverture of Count *de Melfort.*

The plaintiff replied Not covert; on which issue was taken.

The plaintiff having proved his case, the defendant relied on three objections; 1*st*, The coverture pleaded; 2*dly*, That she was an infant when the carriages, for the price of which the action was brought, were furnished, of which she would give evidence, although not pleaded; 3*dly*, That the plaintiff knew of the coverture at the time, and actually gave credit to the husband (who ordered the carriages) and made out the bill in his name.

As to the coverture, *Mingay*, for the defendant, offered in evidence an examined copy of the register of the marriage in the

Swedish

1795. LEADER v. BARRY.

Swedish ambassador's chapel at *Paris*; which Lord *Kenyon* rejected, as no evidence.

2dly, He proved by Colonel *Stanhope* and Lord *Harrington*, her ladyship's relations, and Mr. *Melfort*, the Count's brother, the general reputation of their marriage, as described in the
[354] register, and their reception in *England* and *France*, by the relations and friends on both sides, as man and wife; and that the Count had left her; and *Bull. N.P.* 294, *Cowp.* 594, and *Espin. N. P.* 784, were cited to support the admissibility of such evidence.—*3dly*, As to the infancy, a witness produced a copy of the register of her birth, examined by him with the original in St. *George*'s Church, *Hanover-square*; and Colonel *Stanhope* and Lord *Harrington* identified her, by proving that her ladyship was born about that time, nearly twenty years before the contract.

This was deemed sufficient evidence on the general issue.

To shew that the credit was given to Count *de Melfort*, *Mingay* gave in the bill made out to him, and proved it, by one of the plaintiff's witnesses, to be in the handwriting of one of his clerks.

Lord Kenyon said, if either the coverture or infancy were sufficiently proved, the jury were bound to give a verdict for the defendant. As to the coverture, his Lordship said, that an action for criminal conversation was the only *civil* case where an actual marriage, by producing a copy of the register, need be proved; the same strictness was required in an indictment for bigamy; but that in every civil case, except that above mentioned, general reputation, the acknowledgment of the parties, and reception of their friends, &c. as man and wife, was sufficient proof of coverture. Such was the case here; and the infancy was also sufficiently proved; in both which points *Erskine*, for the plaintiff, acquiesced, and submitted to be nonsuited.

[355] *Erskine* and *Lawes* for the plaintiff.

Mingay and *Barrow* for the defendant.

' Vide *Birt* v. *Barlow*, *Dougl.* 162. *Reed* v. *Passer*, ante 213. *Peake's* Cases, *N. P.* 231.

PHILLIPS

1795.

Phillips v. Eamer et alt. Sheriffs of Middlesex.

THIS was an action on the case against the defendant, for a false return to a writ of *fieri facias*.

Plea of Not Guilty.

In the year 1787, *Phillips* commenced an action against one *Brown*. *Brown* had been a bankrupt in the year 1782; and pending *Phillips*'s action, became a second time a bankrupt.

Final judgment was obtained in this action on the 31*st January* 1788; the commission issued the 19th of the same month.

In the *Trinity* term of the year 1794, *Phillips* sued out a *scire acias* on this judgment; to which *Brown* pleaded his second bankruptcy; and a verdict passed against him in *Michaelmas* term last, for 269*l.* 12*s.* 5*d.*, debt and costs in the original action; 40*l.* the costs of a writ of error brought by *Brown*; the costs of *the scire facias* were 36*l.*

In an action against the sheriff for a false return to a writ of *fieri facias*, issued on a judgment on a *scire facias*; if the declaration states the sum recovered by the *scire facias*, without the costs, it is good, if the judgment in the *scire facias* states them so, distinctly.

In *Hilary* term last, 1795, on the 27th of *January*, *Phillips* signed final judgment, and sued out a *fieri facias*, to levy the debt directed to the defendant as sheriff of *Middlesex*, which was sent into *Brown*'s house on the 2d of *April*.

When the officer went to take possession under the writ, he found a person in possession, under a bill of sale, made to one *Thompson*, dated the 26th of *January*, the day before final judgment was signed. [356]

Thompson indemnified the sheriff; who therefore returned *nulla bona*.

The declaration only stated the recovery and judgment for 269*l.* 12*s.* 5*d.* for his damages and costs in the original action, and 40*l.*, being the costs of non-prossing a writ of error, brought by *Brown* in parliament; for which two sums execution had issued.

Gibbs, for the defendant, objected: that there was a variance between the declaration and the evidence. He said, that it appeared that there had been a judgment on a *scire facias*, by which the plaintiffs had been adjudged to recover the said sums of 269*l.* 12*s.* 5*d.* and 40*l.* costs in error; and also 1*s.* damages, and 36*l.* costs of the trial of the *scire facias*; whereas the declaration only stated the judgment for the two former sums only. That a judgment was an entire thing, and the costs and damages of the *scire facias* being included, that it was a variance.

1795.

PHILLIPS v. EAMER et alt. Sheriffs of Middlesex.

Lord KENYON asked, if the judgment on the *scire facias* stated all these sums distinctly?

It was answered, that it did distinctly, and not as an integral sum.

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* His Lordship ruled, therefore, that there was no variance, inasmuch as these several sums were distinctly stated in the judgment in the *scire facias*; but saved the point.

To prove the bill of sale fraudulent, the plaintiff proposed to examine witnesses as to declarations made by *Brown*.

It was ruled, that declarations made by him at the time of executing the bill of sale, were admissible, but not those made at another time.

A witness was called by the plaintiff. He was asked as to declarations of *Brown* respecting the bill of sale; but being only able to speak as to declarations of his at a subsequent period, he was rejected.

Garrow was proceeding to cross-examine this witness.

Erskine objected to it, as he had asked the witness no question.

Lord KENYON ruled, that having been called, he should be examined.

Where a witness has been called by one party, the other may cross-examine him, though no question has been asked him in chief.

Garrow, for the defendant, stated the facts of his defence to be, that on *Brown*'s becoming a bankrupt in 1782, *Thompson* who was a friend of his, had purchased the goods of his house, which were the goods in question, and given the use of them to him from that time to the present; and that the bill of sale, made on the 26th of *January*, was only for greater security.

Lord KENYON. I am of opinion, that you cannot prevail. The bill of sale is decisive. The possession of the goods is evidence of property, and the pretended sale cannot be resorted to; it is plainly fraudulent. On the 26th of *January*, *Brown* must be

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taken to have been the owner of the goods; he is estopped to say otherwise, since, on that day, he executed the bill in question. That then is inconsistent with the account of their being lent to him by *Thompson*.

The cases cited of ex parte *Blake* and *Bunbury*'s case, have gone far enough. This would go beyond them.

Verdict for the plaintiff.

Erskine, *Law*, and *Wigley* for the plaintiff.

Garrow and *Gibbs* for the defendant.

1795.

Doe v. Davis.

In trespass for the mesne profits, if the ejectment was regularly defended, the plaintiff can go for no costs of it, for they must be supposed to be paid in the costs of that action. *Aliter*, if there has been judgment by default against the casual ejector.

In trespass for the mesne profits, the plaintiff must recover to the amount of 40*s*. to entitle him to costs.

TRESPASS for the mesne profits.

Erskine, for the plaintiff, in his opening, said, that he went for the extra costs of the plaintiff in prosecuting the ejectment, as well as for the value of the premises, from the time of the demise laid in the ejectment.

Lord Kenyon said, that were there was a judgment by default, in such case the plaintiff might in this action go into evidence, and recover the costs of such judgment, as well as the mesne profits of the estate; but where the ejectment had been defended, and the *plaintiff had recovered, and taxed his costs, that he could not recover above his taxed costs.

Mingay, in stating the defendant's case to the jury, said, that if they gave one shilling damages, that it would carry full costs.

Lord Kenyon interrupted him, and said, that it was otherwise; that this was an action of trespass; and there must therefore be damages above 40*s*. in order to entitle the plaintiff to full costs.

The jury found a verdict for the plaintiff, with one shilling damages.

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Erskine and *Wigley* for the plaintiff.

Mingay and *Dampier* for the defendant.

Rex v. Wood.

The inspector of lottery-offices is not exempt from serving the office of constable; for it is a ministerial office, and may be performed by deputy.

THIS was an indictment against the defendant, for not taking upon himself the office of constable of *St. Andrew, Holborn,* above bars.

The defence relied upon by the defendant was, that he was inspector of lottery-offices, regularly appointed by the Commissioners, and that in the necessary attendance upon them and the attention to his duty, he could not discharge the duties of the office of constable; and therefore relied upon this as an exemption.

Lord Kenyon said, that if this was an office which could not be executed by deputy, perhaps the situation of the defendant might

1795. — REX v. WOOD. [*360]

might be admitted as an excuse; but as it was merely ministerial, it could be executed by deputy; and even women had been held liable to be called on to take upon themselves the office of *constable; and therefore the matter relied on by the defendant could not afford him any exemption.

The defendant was found guilty.

Garrow and *Shepherd* for the prosecution.

Erskine for the defendant.

Vide 2 *Hawk.* 63.

DOE on Dem. BRYANT et alt. v. WIPPLE.

EJECTMENT by two tenants in common.

There was a joint demise laid of the whole, and a separate demise by each, but of the whole premises.

Per Lord KENYON. Under a demise of the whole, an undivided moiety may be recovered.

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JAQUES v. WHITCOMB et alt*.

In order to entitle the plaintiff, in an action under stat. 32 *Geo.* 2. *c.* 28, to recover the 50*l.* for extortion, it must appear that a table of fees was put up, according to the directions of that statute, and that the defendant took more than is there allowed.

THIS was an action against the defendants, who were sheriffs' officers, under statute 32 *Geo.* II. *c.* 28, for extortion.

The declaration stated, "That on the 6th day of *November* 1794, one *Henry Richardson* sued out a writ of *Ca. ad Resp.* directed to the sheriffs of *Middlesex* against the plaintiff, for a debt of 557*l.* 10*s.* and that the said sheriffs made their warrant, directed to the defendants (who were sheriffs' officers) to arrest the plaintiff, in order that he might be held to bail for that sum; that the defendants did arrest the plaintiff under and by virtue of that writ, and demanded and took from him the sum of 5*s.* for detaining the said plaintiff, and waiting till he had given bail to the said writ; which said sum of 5*s.* was a greater sum than was by law allowed to be taken on that occasion; by reason whereof an action accrued to the plaintiff, to recover the sum of 50*l.*"

* In the case of *Hannam* v. *Ormerod*, Summer Assizes at *Maidstone*, 1795, the same point was ruled by Lord Chief Baron *Macdonald*.

By

By the first section of the stat. 32 *Geo.* II. *c.* 28., "Officers are prohibited from demanding for caption or attendance beyond the legal fee;" and by sec. 2. "No officer shall take for the lodging, *&c.* of any prisoner more than is allowed in such cases, by *an order of the justices at their sessions;" which order, [*362] regulating such charges, is ordered to be stuck up in a conspicuous part of the sessions-house. There is a penalty of 50*l.* by the statute, against persons offending against the provisions of the act.

The plaintiff proved the issuing of the writ, the arrest by the defendants as officers, and the receipt of 5*s.*

Lord KENYON asked if there had been any table of fees made out, pursuant to the directions of the statute?

He was answered, that there had not; but the plaintiff's counsel said, that the action was founded upon the first clause of the statute, which prohibits the taking of all fees, other than by law allowed: that this had reference to some former statute, which could only be 23 *Henry* VI. wherein the fees to the sheriff and officer are fixed (the one to 20*d.* and the other 4*d.*); that the officers had here, therefore, taken above the fees allowed by law; and so became liable to the penalty of 50*l.* given by the statute. They further insisted, that no table of fees was necessary, inasmuch as it was mentioned in the second section of the stat. 28 *Geo.* II. only, and not in the first; and must therefore be confined to the object of regulation in the second section: that is, to the charges for lodging, diet, *&c.* mentioned in it; and not to the fees for an arrest.

Lord KENYON said, that he was of opinion, that as no table of fees appeared to have been made, beyond which rate so settled the officers had taken, the action could not be maintained. His Lordship observed, that this was a penal action; and that, in [363] in order to subject the officer to its penalties, his duty ought to have been pointed out to him, which duty it should appear that he had infringed; that for that purpose a table of the fees ought to have been made, and hung up in the sheriff's office; and then the action should have been for taking fees not warranted by the table.

His Lordship was therefore going to order the plaintiff to be called, when it appeared that there was a count for money had and received; upon which the plaintiff's counsel insisted on going on, as the money was taken by extortion.

Gibbs objected; and said that the counts could not be joined;

 and

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JAQUES v. WHITCOMB et alt.

and that many judges had refused to try causes where they had been joined.

Lord KENYON said he would try it; but hinted, that to make it extortion, the sum which ought to be legally demanded, should first have been ascertained; which brought the case back to the first objection.

The plaintiff proceeded to prove the payment of the 5s; but could not prove the receipt of the money by *both* the defendants.

Lord KENYON said that this was necessary; that this was the difference between the action *ex delicto* or *ex contractu*; where it was *ex contractu*, as in this case, a joint contract should be proved.

The plaintiff was therefore nonsuited.

Garrow and *Marryatt* for the plaintiff.

Erskine and *Gibbs* for the defendant.

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SITTINGS AFTER TERM AT GUILDHALL.

Friday, July 3d.

DOE ex. dem. WINCKLEY v. PYE, Esq. Principal of Barnard's Inn.

The tenant in possession is not an admissible witness to prove any thing connected with the title under which he holds.

EJECTMENT for a cellar belonging to chambers of the lessor of the plaintiff, in possession of *Thomas Leach*, Esq.

The plaintiff's case was this:—

A Mr. *Heath* was tenant, from year to year, of a set of chambers and the cellar in question, under the society of *Barnard's Inn*, in the year 1793.

In that year, Mr. *Leach* applied to him to accommodate him with the use of the cellar; which Mr. *Heath* agreed to do, as long as he staid in the chambers, on condition that Mr. *Leach* made him a conveniency in his chambers for coals, in lieu of the cellar; to which Mr. *Leach* consented; but such condition was never performed, though Mr. *Leach* kept the cellar.

Mr. *Leach*, immediately after this agreement, applied to the principal of the Inn for leave to make alterations in the premises, by erecting a staircase, and opening a communication between the cellar and his chambers; upon which the society appointed their surveyor to supervise the work, which being approved of by him, was done at the expence of Mr. *Leach*.

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Doe ex dem. Winckley v. Pye, Esq. Principal of Barnard's Inn.

After this, Mr. *Heath* quitted *Barnard's Inn*, and applied, with Mr. *Winckley*, to the principal of the Inn, to procure Mr. *Winckley* to be admitted as his successor, which was assented to; and Mr. *Winckley* was admitted to stand in Mr. *Heath's* place as tenant: but nothing was said about the cellar at that time, though Mr. *Heath* had informed Mr. *Winckley* of the cellar being in possession of Mr. *Leach*, and on what terms.

Mr. *Winckley* took possession of the chambers accordingly, on the 1st day of ——, but not of the cellar, nor was any application made to Mr. *Leach* to quit, till a short time before this action was commenced. But previous to commencing the action, application was made to the defendant *Pye*, as principal of the Inn, for his consent to it; when he said he had no objection.

All this appeared from the evidence of Mr. *Heath*; the answer in Chancery of the defendant *Pye* to a bill filed against him for a discovery; and from the examination of the carpenter to the society.

Mingay, for the defendant, would have called Mr. *Leach* as a witness on the ground that not being a member of the society, he was an admissible witness to prove upon what terms he took the cellar of *Heath*; but Lord Kenyon ruled, that being a tenant in possession, he could not be examined.

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When the landlord suffers his tenant to exercise acts of ownership, and makes no objection to it, it is evidence to be left to the jury, whether he did not mean to be bound by those acts of his tenant.

His Lordship said, Lord Mansfield had often ruled, that where one person, having title to premises in the possession of another, stands by, and sees his tenant exercise acts of complete ownership, by making alterations and improvements inconsistent with the right of the landlord, and makes no objection to it, but permits him to go on for a length of time, it is evidence to be left to the consideration of the jury, whether he did not mean to be bound by it, as an assertion of right; with which doctrine he perfectly coincided. Here Mr. *Heath*, when he saw the alterations making by Mr. *Leach*, which disannexed the cellar from his (*Heath's*) chambers, and added them to his own, might have objected, and prevented Mr. *Leach* from proceeding: but his silence was an acquiescence: and when he attended Mr. *Winckley* to the principal of the Inn, to recommend him as his successor in the chambers, no notice was taken of the cellar's being in the possession of Mr. *Leach*, but *Winckley* was accepted tenant, and contented himself with taking possession of the chambers without the cellar; nor did he think of demanding it till the time of bringing this action.

Under all these circumstances, Lord Kenyon directed the

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DOE ex dem. WINCKLEY v. PYE, Esq. Principal of Barnard's Inn.

jury to consider the cellar as virtually surrendered by Mr. *Heath* to the society, and by them added to the chambers of Mr. *Leach*; and the admission of Mr. *Winckley* in the room of Mr. *Heath*, as a new demise of the chambers only: and they found accordingly a verdict for the defendant.

Erskine and *Barrow* for the plaintiff.

Mingay and *Sellon* for the defendant.

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Saturday, July 4th.

MARSHALL v. DE LA TORRE.

In an action of covenant for demurrage on a charter-party given "while waiting at *Portsmouth* for convoy, and discharging her cargo at *Barcelona*," the plaintiff can only claim demurrage at those two places; not for any delays at other intervening places.

THIS was an action of covenant on a charter-party, dated 3d of *May* 1794, on the ship *Merchant of Shields*, from the port of *London*, to join convoy, and to proceed from thence to *Barcelona*, and there to discharge her cargo; to be allowed forty-one running days to wait at *Portsmouth* for convoy, and to discharge her cargo at *Barcelona*; and for all the time beyond the forty-one days above stated, 13*s*. *per* ton demurrage.

On the 5th of *June* she arrived at *Portsmouth*. When she got there, the convoy for *Barcelona* had sailed. The captain waited there twelve days, and then received orders from the Admiral's secretary to proceed to *Falmouth*, under convoy of the *Pearl* frigate.

She reached *Falmouth* under this convoy, and sailed again from *Falmouth* under the general convoy of the *America*, *Alfred*, and *Hornet* sloops, on the 14th of *August*, having been detained between forty and fifty days.

Off *Cape Finisterre* the convoy was separated. They proceeded, and the *America* stood into *Gibraltar* bay, and made a signal for the *Merchant of Shields* to follow her, which she did. She waited there twelve days for convoy, and then proceeded under

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convoy of a *Spanish* ship of the line, from whom she separated, and did not arrive at *Barcelona* till the 6th of *October*, and was forty-four days in discharging her cargo.

The action, therefore, was brought to recover demurrage, under the following particular: twelve days at *Portsmouth*, fifty days at *Falmouth*, twelve days at *Gibraltar*, and forty-four days at *Barcelona*; from whence were deducted the forty-one running days allowed by the charty-party, and demurrage was claimed for seventy-seven days.

The words of the charty-party, upon which the question turned, were "That forty-one running days should be allowed for waiting at *Portsmouth* to join convoy, and discharging the

cargo

cargo at *Barcelona*; the said forty-four days to be accounted and commence at *Portsmouth* twenty-four hours after her arrival there; and at *Barcelona*, from the day the said ship shall be ready to deliver her cargo.

The defendant relied upon the words of the charty-party, whereby demurrage was given only in case of detention at *Portsmouth*, in waiting for convoy, or at *Barcelona*, in discharging the cargo; and therefore insisted, that for the days while she was detained at *Falmouth* and at *Gibraltar* there was no demurrage due; and according to that calculation, allowing thirteen days at *Portsmouth* and forty-four at *Barcelona*, making fifty-seven days, or a surplus of sixteen days, he paid into Court 88*l*. 15*s*. being the demurrage for that time.

Erskine, for the plaintiff, said, that this was an action on a charter-party, and that mercantile contracts were to be construed with liberality; that the intention of the parties evidently was to include every thing in the description of days for which [269] demurrage was due, except those actually employed in the performance of the voyage.

Lord KENYON said, that as this was an action on a deed in which the meaning of the parties is to be collected from the deed itself, it would be dangerous to substitute other words for those used in the deed; such would be to substitute one contract for another, which could not be, even if one was more beneficial than another; that the words of the contract gave demurrage only while waiting at *Portsmouth*, or discharging at *Barcelona*; and he was therefore of opinion, it could not be claimed during the periods contended for by the plaintiff.

The jury found a verdict for the defendant.

Erskine, *Law*, and *Giles* for the plaintiff.

Gibbs and *Park* for the defendant.

WEAVER v. PRENTICE and PRATT.

An entry in the books of the receiver of the duties on carts, &c. is not evidence of property, without shewing by whom the entry was made.

CASE for work and labour, and materials found.

The only doubt in the case was, whether the work had been done for one of the defendants only, or for both; one having suffered judgment to go by default.

1795. WEAVER v. PRENTICE and PRATT.

The work was carpenter's work, in making a timber cart.

To prove that the cart was the joint property of the defendants, the deputy-receiver of the duties was called, and he produced the book in which the entry of the payment of the duties was in the names of both of the defendants.

[370] *Garrow*, for the defendants, objected to this evidence, as it did not appear by whom the entry was made. It might have been by one of the defendants only, without the consent of the other, or by a stranger; and that to make it evidence, therefore, it must be proved to have been made by the consent of, or with the knowledge at least of both.

It was answered by *Mingay*, for the plaintiff, that these were public books, and that the entries must therefore be taken to be authentic.

Lord KENYON held, that the mere entry in that manner, without further evidence, was not sufficient.

Mingay then said, he would prove that the cart had been used on their joint account; and that, coupled with the circumstance of the entry, would be sufficient.

His Lordship acquiesced; and evidence being brought to that effect, the plaintiff had a verdict.

Mingay and *Manley* for the plaintiff.

Garrow for the defendants.

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GODFREY v. TURNBULL and MACAULEY.

A notice in the *Gazette* of the dissolution of a partnership, is sufficient notice to the world, at least as against those who have had no previous dealings with the firm; so that they cannot sue both parties on a security, given by one in the name of both, after notice in the *Gazette*, in the partnership name, of the dissolution.

THIS was an action by the plaintiff, as indorsee of a promissory note, against the defendants, as the makers of it.

The defendants had been partners in trade, but the partnership had been dissolved prior to the date of the note.

Macauley, one of the defendants, suffered judgment to go by default.

The other defendant relied, that the note was made by the defendant *Macauley* only, after the dissolution of the partnership, who had put their joint names on it without any authority from him.

The note was dated the 6th of *April* 1793. On the 19th of

March

March preceding, notice of the dissolution of the partnership, dated the 15th, had appeared in the *Gazette*. 1795.

GODFREY v. TURNBULL and MACAULEY.

The question was, Whether the notice given in the *Gazette* was sufficient, so as to exonerate the defendant *Turnbull?*

Per Lord KENYON. In general, if a partner gives a note in the partnership name, all the partners are bound by it; and that is the case, even if given after the actual dissolution of the partnership, if that was not sufficiently notified, and the party who took the note, took it on the faith of the partnership name.

A secret dissolution of a partnership cannot discharge the partners; but if the dissolution is notified in the ordinary and usual way, as it is the only mode by which the fact of the dissolution can be promulgated to the world, at least to those who have had no previous dealing with the partners, it seems sufficient, at least to be left to the jury, from thence to infer notice. [372]

In many cases, notice in the *Gazette* is suffieient to subject a party to penalties, as in the cases of smuggling and outlawries. So in the cases of bankrupts, notice in the *Gazette* is sufficient for every purpose. In the present instance, there is no proof of any actual notice to Mr. *Godfrey* the plaintiff; but the publication in the *Gazette* is proved, antecedent to his taking the note.

The jury are to judge from the practice in the usual course and ordinary mode of business. Notices are to be found in every *Gazette* of the dissolution of partnerships; which seems to point out that as the mode adopted by the world for notifications of this sort, and therefore every prudent man in business ought to consult them.

The jury found a verdict for the defendant, *Turnbull.*

Erskine and *Bailey* for the plaintiff.

Garrow and *Park* for the defendant.

Vide *Baker* v. *Charlton, Peake's N. P.* Cases, 80. *Willet* v. *Chambers, Cowp.* 814.

Vide *Gowram* v. *Hope, Espin. N. P.* 776.

1795.

Monday, July 6th.

M'Andrew *v.* Bell.

To prove an interest in the insured, the production of the bill of lading, and the evidence of the captain of the ship that he had the goods mentioned in it on board, is sufficient.

CASE on a policy of insurance on the ship *Unity*, from *Lisbon* to *London*, and her cargo of oranges, by the plaintiff, as consignee.

To prove interest, the plaintiff produced the bill of lading; and the captain, who had been called as a witness, was asked if that was his bill of lading? and whether he had the goods on board specified in it? He answered in the affirmative.

Erskine put it to Lord Kenyon, if that was sufficient proof of interest? His Lordship ruled, that it was.

The defence relied on was a concealment of circumstances.

The facts in evidence were, that the plaintiff, on the 24th of *November*, received a letter from *Lisbon*, dated the 8th of the same month, informing him that the ship was then ready to sail. He did not make the insurance on the receipt of the letter, but waited till the 2d of *December*, when he effected it; and at the time did not communicate the contents of the letter to the underwriters.

What is a concealment of circumstances sufficient to avoid a policy of insurance.

It also appeared in evidence, that the plaintiff had not made the insurance till after the arrival of another ship, which sailed at the same time with the *Unity*, and on board of which the plaintiff had goods.

Lord Kenyon said, that he was of opinion, that there was a concealment of circumstances sufficient to avoid the policy; that it was clear the underwriter ought to be acquainted with every circumstance respecting the ship's time of sailing, and her pro-

[374] bable arrival, inasmuch as the premium sustained so considerable an advance when the ship was deemed a missing ship. In the present case, the information received on the 24th of *November*, of the ship's sailing on the 8th, was very material; and it appeared that the plaintiff did not intend to insure until he believed her to be missing, as he did not effect the policy for ten days after; and then not till another ship which had sailed at the same time with the *Unity*, had arrived in safety.

The jury found a verdict for the defendant.

Garrow and *G. N. Best* for the plaintiff.

Erskine for the defendant.

1795.

Short v. Edwards.

A lettter written by the plaintiff's attorney, demanding payment of an inclosed bill, does not confine the plaintiff from going into evidence of other matters not included in the bill so inclosed.

ASSUMPSIT for work and labour.

Plea of the general issue.

The action was brought to recover the hire of a horse and chaise, and other demands of the same nature.

When the plaintiff was proving the hire of the horse, &c.

Mingay objected to the plaintiff's going into evidence of it. * His objection was grounded on the demand made previous to the bringing of the action, not having included any article on that account.

He then produced the letter written by the plaintiff's attorney to the defendant, the terms of which were, that unless he paid the amount of the inclosed bill, he would be sued. The bill inclosed only contained two articles, *viz.* "To balance of account, 1*l.* 18*s.*—To hire of a post-coach, 3*l.* 3*s.*" These, he contended, were the only items he could claim, or go into evidence of, at the trial. [*375]

Lord Kenyon asked, if he had given in any particular under a judge's order? and if it contained those two articles only?

Being answered, that he had delivered a particular, but of many other articles,

His Lordship observed, that he was to be bound by the particular only; and there was no colour for limiting him to that claimed by the attorney.

Garrow and —— for the plaintiff.

Mingay for the defendant.

Maesters v. Abraham.

A letter written by an agent or broker, by whom a contract has been made for the sale of goods, is not evidence where such agent or broker can be called as a witness.

CASE on an agreement, by which the plaintiff sold all his bark to the defendant at 18*l.* *per* load, to be delivered in *London*.

The question was, Which party was to find bags for the carriage of it on delivery?

To prove that the defendant had agreed to furnish the bags, the plaintiff proved that the bark had been sold by one *Eyre* a broker; and he produced a letter from *Eyre*, addressed to him; in

1795. in which *Eyre* said, "That the bags would be ready by a certain day."

MAESTERS *v.* ABRAHAM.

Eyre was at that time in the box as a witness.

Erskine, for the defendant, insisted, that *Eyre* should be questioned as to the fact; and the letter should not be produced.

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It was answered by *Gibbs*, that *Eyre* was employed by the defendant as agent, who was therefore bound by his acts; and that his letter was therefore evidence against his principal.

Lord KENYON said, that as agent, he would admit evidence of what he had done on account of the defendant; but that that should be learned from himself, not by his letter.

The plaintiff was nonsuited.

Gibbs, and *Marryat* for the plaintiff.

Erskine for the defendant.

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Monday, July 7th.

BAILEY *v.* LECHMERE.

Where a party has agreed to refer all matters in difference to arbitration, and the arbitrator has decided on it, such determination shall be conclusive and binding on the party; nor shall he be allowed to go into the original case at the trial, unless there was some misconduct on the arbitration.

THIS was an action on the case, against the defendant, for unskilfully navigating his barge on the river *Thames*; by which the plaintiff's boat was sunk.

Plea of not guilty.

Mingay, in his opening for the plaintiff, stated, that after the plaintiff had received the injury which was the object of the present action, on applying to the defendant for compensation, they had agreed to refer the dispute to the Watermen's Company; that the company had accordingly canvassed the matter so referred to them; and awarded that the defendant should pay half the damage the plaintiff's boat had sustained.

He also stated, that the matter had been in like manner referred to another common friend.

Lord KENYON said, he had ruled before, that where parties had agreed to submit their differences to any third person to settle their disputes, and that such person did undertake the business, and made any award or order respecting them, the parties should be bound by it; and that he who was dissatisfied with the determination should not be allowed then to have recourse to an action; for that after taking his chance of having a determination in his favour, he was then too late to recede from his engagement.

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If, however, there were any circumstances attending the reference

ence to such third person, which would be a sufficient objection in point of law to an award (such as partiality in the arbitrator, not hearing the party's witnesses, or such conduct) it should be open for the parties in such case to shew it at the trial.

The defendant failed in proving any circumstance of this sort, or a non-acquiescence to the reference, which he also attempted to set up, and

The plaintiff obtained a verdict.

Mingay and *Shepherd* for the plaintiff.

Erskine for the defendant.

COLSON et alt. Assignees of HUNTER, a Bankrupt, *v.* WELSH.

Tuesday, July 8th.

To an action for not paying over a sum of money pursuant to agreement, the defendant cannot avail himself of a set-off.

THIS was an action on the case.

The declaration stated, that *Hunter*, the bankrupt, on the 14th of *May* 1793, then being the owner of forty barrels of pork, which were in the possession of one *Atkinson*, a wharfinger; and *Hunter* being indebted to the defendant in the sum of 80*l.* and to *Atkinson* in the sum of 50*l.* it was agreed by and between *Hunter* and the defendant, that *Hunter* should give to the defendant an order upon *Atkinson*, to deliver the forty barrels of pork to the defendant, at and after the price of 65*s.* *per* barrel; that the defendant should pay himself 40*l.* of his debt, the 50*l.* to *Atkinson*, and pay over the remainder to *Hunter*, to wit, the sum of 40*l.*; and that, in consequence of this agreement the pork was delivered to the defendant. He paid the 50*l.* to *Atkinson*; but, contrary to his agreement, after reserving 40*l.* to himself, on account of his own debt, refused to pay over the residue to *Hunter*, or to the assignees, since his bankruptcy.

This action was brought by the assignees, for the purpose of recovering that residue.

The defendant pleaded the general issue, and gave notice of set-off of a larger debt due from *Hunter* to him.

The plaintiff proved the agreement, as laid in the declaration, and an express promise by the defendant to pay over the remainder, only deducting the discount; and that there should no attachment issue on it, or deduction be made.

Gibbs, for the defendant, objected: that the action was not maintainable, inasmuch as this was not a debt, but damages; and the assignees could not sue for unliquidated damages.

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Lord KENYON.—Cannot assignees sue for damages for breach of covenant, or for a breach of contract, or of an agreement made by the bankrupt? The action is certainly maintainable.

Erskine, for the plaintiff, insisted, 1*st*, That this was a * description of action in which a set-off could not be allowed; but 2*dly*, That if it was an action in which a set-off could be allowed, the defendant had precluded himself from taking the benefit of it, by his own agreement; he having thereby waived every benefit of that sort, by promising to pay over the residue of the price of the pork, after deducting the sums of 40*l.* and 50*l.* without any further deduction or charge whatever.

Lord KENYON said, he was of opinion, that evidence of set-off was inadmissible; that the declaration was very ingeniously drawn, and was, on the face of it, not an action for a debt, but for damages for breach of an agreement: that the statute of set-off went to cases only of mutual debts; if, therefore, the plaintiff had been forced to have had recourse to the common count for money had and received, in such case the set-off would be admissible; but not in the present case, where the plaintiff had proved the special count and ground of his action.

The plaintiff recovered.

Erskine and *Alderson* for the plaintiff.

Gibbs and *Wigley* for the defendant.

Vide *Nedriff* v. *Hogan*, 2 *Burr.* 1024. 1 *Black Rep.* 394. *Cowper* v. *Strickland*, *Cowp.* 56.

In the next term a new trial was moved for; but the Court refused a rule to shew cause.

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JAMESON, Assignee of WHITE, a Bankrupt, *v.* EAMER et alt. Sheriff of London.

When the act of bankruptcy relied on is a denial to creditors, a witness proving that several persons called, whom the witness believed to be creditors, but could not say whether in fact they were so or not, is evidence to go to the jury.

TROVER for a quantity of household furniture, taken in execution by the sheriffs.

The commission issued the 12th *November* 1791.

To prove the act of bankruptcy, it was given in evidence by a witness, that *White* the bankrupt, in the year 1791, was in very

distressed

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JAMESON, Assignee of WHITE, a Bankrupt, v. EAMER et alt. Sheriff of London.

distressed circumstances; that he had given orders to the witness to be denied, and was in fact denied, when at home, to several persons, many of whom called more than once; but the witness could fix on no person in particular, nor did she know whether the persons calling where creditors or not; but she believed they were, from the circumstance that the same persons had called more than once.

Gibbs, for the defendant, objected to this evidence as insufficient to establish the act of bankruptcy, and insisted that there must be positive evidence that the denial was to a creditor who came for money; and cited *Jackman* v. *Nightingale*, *Bull*, *N. P.* 40.

Lord KENYON said, there was no doubt that the denial must be to a creditor; but that, from all the circumstances taken [382] together, he was of opinion there was evidence to go to the jury, to say whether the persons who called were of that description or not.

The plaintiff failed in other parts of his case; and by the recommendation of the Chief Justice, a juror was withdrawn.

Erskine and *Toller* for the plaintiff.

Gibbs and *Lawes* for the defendants.

Vide *Barrow* v. *Foster*, *Green's B. L.* 45. and *Co. Bank L.* 98.

END OF TRINITY TERM IN THE KING'S BENCH.

IN THE COMMON PLEAS.

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SITTINGS AFTER TRINITY TERM AT WESTMINSTER.

GRIFFIN *v.* ROBERTS.

Tuesday, June 30th.

Where a bailiff pays money in consequence of an attachment against the sheriff, Q. Whether he can maintain an action against the defendant, whom he had liberated on the attorney's undertaking?

ASSUMPSIT for money laid out and expended to the use of the defendant.

Plea of the general issue.

The case stated on the part of the plaintiff was, that in the beginning of the year 1794, *Roberts*, the defendant, drew a bill upon one *Yeates*, an attorney, for 150*l.*; which bill had come into the hands of one *Adams*, who had sued out writs against the

drawer

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drawer, the acceptor, and one *Bryan*, who was indorser on it; that *Roberts* the defendant, being arrested on this bill, *Yeates* had given an undertaking to the sheriff to appear for him at the return of the writ. Bail not being put in by *Yeates*, pursuant to his undertaking, the sheriff was fixed, and the officer (the present plaintiff) compelled to pay the money; to recover which the present action was brought.

The plaintiff's counsel then proved the issuing of the several writs, the arrest of the defendant, and *Yeates*'s undertaking. He then gave in, in evidence, the rule to bring in the body; and afterwards proved the payment of the money by *Griffin* the plaintiff, and the receipt of it by *Adams* the plaintiff in the original action.

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But in such an action, the actual issuing of the attachment against the sheriff must be proved.

On this evidence, the defendant's counsel insisted that the plaintiff should be nonsuited. They first contended that a sheriff's officer could not maintain any action in the present form; the stat. 23 *Hen.* VIII. having directed the sheriff to take a bail-bond in all cases of arrest on mesne process,—that course, and that course only, could be pursued; that this was an attempt to charge the defendant, in consequence of an undertaking without bond by *Yeates*, and therefore not within the statute; and to that effect cited *Rogers* v. *Reeves*, 1 *Term Rep.* 418, where it was expressly held, that such un undertaking was void in law, and that no action could be maintained upon it. On another ground, they contended, that a nonsuit should take place, because of the defect of evidence; the plaintiff having given no evidence either of the rule for an attachment against the sheriff, or of an attachment having issued, in consequence of which the money had been paid. To support this objection, they relied, that in order to entitle the sheriffs to call upon the party to pay the money, it should appear to have been done either by compulsive process of law, or by direction of the party; that no assent of the defendant in the action to the payment of this money appeared; and that it became necessary for the plaintiff to shew a payment by legal coercion, which could only be by shewing that the process of attachment had actually issued: whereas the plaintiff had offered no sort of evidence to this effect; and the payment should therefore be taken to be a payment in the plaintiff's own wrong.

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For the plaintiff, it was answered, that the case of *Rogers* v. *Reeves* did not apply to the present case; that that was the case of an action brought by the officer against a surety, a person who had undertaken to put in bail, which was by the statute certainly required; whereas this was an action against the party himself,

himself, for whom the money had been paid; and that in fact the point had been ruled in a case in K.B. sittings, after *Hil.* 25 *Geo.* III. of *Warraker* v. ——; which action was of the same nature as the present.

EYRE, C. J. said, that whether the present action was maintainable by law or not, he had considerable doubts, as the plaintiff's proceeding was not in strict conformity to the statute. But upon the case itself, he was clear the evidence was defective. The mere advancing of the money could not support the action. It should appear to the Court, that the necessary steps had been taken to enforce the payment from the sheriff, one of which was the issuing of the attachment. It did not appear that the payment was either compulsory or with the defendant's consent; and that the plaintiff should therefore be called.

Adair, Serjt. and *Marryat* for the plaintiff.

Bond, Serjt. and *Espinasse* for the defendant.

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TAYLOR v. NERI.

Monday, July 6th.

An action with a *per quod servitium amisit* will not lie for the manager of a place of public entertainment against a person for beating one of the performers, who is thereby prevented from performing.

THIS was an action on the case.

Plea of the general issue.

The declaration stated, that the plaintiff being the manager of the Opera-house, had engaged one *Breda* as a public singer during the season, at a salary; that the defendant had assaulted and beat the said *Breda; per quod* the plaintiff lost his service as a public performer.

On the circumstances of this case being opened, EYRE, Chief Justice, expressed a doubt whether the action was maintainable or not. His Lordship said, that he did not think the Court had ever gone further than the case of a menial servant; for that if a daughter had left the service of her father, no action *per quod servitium amisit* would lie for debauching her.

Adair, Serjt. for the plaintiff, said he had no cases which came up to the present; but observed, that there seemed no distinction, upon principal, between cases where the service was to be performed daily or casually; that they were both cases of hired servants; and that the case of a daughter, he apprehended, had been carried much further.

The Chief Justice, on this, observed, that if the present action could be supported, every man, whose servant, whether domestic

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TAYLOR v. NERI.

or not, was kept away a day from his business, could maintain an action. In this case, the record stated that *Breda* was a servant hired to sing; and he was of opinion, that he was not a servant at all; and therefore would not leave the case upon the record.

The plaintiff was nonsuited.

Adair Serjt., *Marshall*, Serjt., and *Lawes* for the plaintiff.

Bond and *Cockell*, Serjts. for the defendants.

Vide *Fores* v. *Wilson*, *Peake's Cases*, *N. P.* 55. *Jones* v. *Brown*, ante 217. *Edmonson* v. *Machell*, 2 *Term Rep.* 4. *Tullidge* v. *Wade*, 3 *Wils.* 18.

END OF TRINITY TERM.

CASES

CASES

ARGUED AND RULED

AT

NISI PRIUS,

IN THE

KING'S BENCH,

IN

MICHAELMAS TERM, 36 GEORGE III. 1795.

SECOND SITTINGS IN TERM.

Brown *v.* Brooks, Widow.

Wednesday, Nov. 18th.

To an action for fees as a proctor or solicitor, it is no defence that the defendant employed a third person, who employed the plaintiff, by whom the business was done, unless the money was actually paid to such third person before action brought.

THIS was an action of *assumpsit* for work and labour, with the usual counts.

Plea of the general issue.

The action was brought to recover a sum due by the defendant to the plaintiff, who was a proctor, for business done for the defendant in the Ecclesiastical Court.

The defence was, that the defendant had employed a person of the name of *Dickinson*, by whom the business had been done, and to whom she considered herself as liable for payment.

It appeared, however, in evidence, that *Dickinson* was clerk to *Brown*, and in fact had himself never been admitted as a proctor.

Lord Kenyon, upon this evidence, ruled, that it was no defence, as *Dickinson* was the servant of *Brown*, and could not be entitled to the fees in his own right; but that if it appeared that the defendant had actually paid *Dickinson* for the business done,

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BROWN v. BROOKS, Widow.

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that would have been a sufficient defence to the action; but that merely *considering herself as liable to *Dickinson*, could be none.

The plaintiff had therefore a verdict.

Mingay and *Lawes* for the plaintiff.

Erskine and *Pell* for the defendant.

STRONGITHARM *v.* LUKYN.

Where the consideration of a note was for payment for engraving plates upon which assignats were to be forged, if the party did not know that they were made with a fraudulent intention, and supposed them to be issued by the authority of government, he may recover on such note.

CASE on a promissory note.

The note was drawn by the defendant, payable to one *Caslon*, and by *Caslon* indorsed to the plaintiff.

The plaintiff proved the defendant's hand-writing, and the indorsement by *Caslon*.

**Erskine*, for the defendant, stated his defence to be, that *Lukyn* was a stationer, and the plaintiff an engraver; and that the note upon which the action was brought was given to *Caslon*, for the purpose of paying the plaintiff for the engraving of copper-plates upon which *French* assignats were to be forged; and contended, that as the consideration of the note was fraud, that it contaminated the whole transaction, and rendered the note not recoverable by law.

Caslon, the indorser, was called as the witness. He proved, that *Lukyn* the defendant, having it in contemplation to strike off impressions of a considerable quantity of assignats, to be

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issued abroad, had applied to him for the purpose of recommending an engraver, for the purpose of engraving the necessary plates; and that *Lukyn* represented to him that they were for the Duke of *York*'s army.

He said that he applied to *Strongitharm* the plaintiff, who at first declined the business totally; but that being assured by the witness that it was sanctioned by government, and was for the use of the Duke of *York*'s army, he then consented. The witness further denied that it was ever communicated to the plaintiff that they were to be circulated for any other purpose than as he had represented.

Lord KENYON said, that if the present transaction was grounded on a fraud, or contrary to the laws of nations, or of good faith, he should have held the notes to be void; but that it did not appear that there was any fraud in the case, or any

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violation of positive law. Whether the issuing of these assignats, for the purpose of distressing the enemy, was lawful in carrying on

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on the war? he was not prepared to say; or whether it came within the rule, *an dolus an virtus quis in hoste requirit?* but let that be as it might, it did not apply to the present case. It was not in evidence that the plaintiff was a party in any fraud, or that it was ever communicated to him that the assignats were to be used for any improper purpose: on the contrary, he supposed that they were circulated by the authority of the higher powers of this country, and therefore did not question the propriety or legality of the measure.

His lordship declared his opinion therefore to be, that the consideration was not impeached, and that the plaintiff was entitled to recover.

The jury found a verdict for the plaintiff.

Mingay and *Marryat* for the plaintiff.

Erskine and *Lawes* for the defendant.

SITTINGS AFTER TERM.

DOE ex dem. STUTSBURY et Ux. et alt. v. SMITH et Ux.

Monday, Nov. 30th.

In an action of ejectment by the heir at law, against the devisee, to prove the execution of the will, it is not necessary to call the subscribing witnesses.

THIS was an action of ejectment for copyhold premises, held of the manor of *Stratford, Bow*.

*The question as to the title, was between the plaintiffs, as coheiresses of one *Nicholas Adams*, who had been in his lifetime seised in fee of the premises in question, according to the custom of the manor,—and the defendants, who claimed as devisees under *Adams*'s will.

The defendants produced a will, made by *Nicholas Adams*, and attested by three witnesses; by which will he had devised the premises in question to a Mrs. *Midhurst* for life (whom the defendant had married) remainder to a son of the testator's, by her. [*392]

The plaintiffs insisted that the will had been a forgery; and relied on their title as heirs at law.

To prove the execution of the will, the defendants called the three subscribing witnesses.

Each of them distinctly proved the execution by the testator.

Lord KENYON said, that the defendants had acted in this cause with much candour, and had proved more than was necessary; that it had been sufficient to have proved the execution of the will

 by

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DOE ex dem. STUTSBURY et Ux. et alt. v. SMITH et Ux.

*Bull, N. P.

by a witness who had seen the testator execute the will, and the other witnesses attest it in his presence; whereas here he had *called the three subscribing witnesses, who had all proved the execution of the will, which was more than was required.

The defendants had a verdict.

Gibbs and *Const* for the plaintiffs.

Erskine, Garrow, and *Shepherd* for the defendants.

Vide *Bull N. P.* 264. and *Cases*, ibid. *Pike* v. *Badmering*, cited in *Rice* v. *Oatfield*, 2 *Stra.* 1096. *Lowe* v. *Jolliffe*, 1 *Black. Rep.* 365.

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Same day.

FRYETT ex dem. HARRIS v. JEFFREYS.

Where a right of entry is given in three months after notice of the premises being out of repair, acceptance of rent, after the three months expired, does not prevent the plaintiff from maintaining an ejectment, particularly if the premises are not repaired at the time of bringing the action.

EJECTMENT for a house in *Dorset-court, Westminster*.

The defendant was lessee of the house in question, under a lease, of which several years were unexpired. By a covenant in the lease, he was bound to repair; and in case of not repairing within three months after notice, a right of entry was given to the plaintiff.

The plaintiff's counsel proved the lease, and notice of the want of repairs, which were specified in it at length (which notice was dated the 18th of *April* 1795) and there rested their case; so that a right of entry accrued on the 18th of *July* following.

The demise in the ejectment was dated the 2d of *November*; and it was proved that the house was not then in repair.

The defendant gave in evidence a receipt of the lessor of the plaintiff's for the rent up to *Michaelmas*; which receipt was dated the 18th of *October*.

For the defendant, it was then insisted, that the receipt of rent was a waiver of the plaintiff's right of entry; that, on the

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expiration of the three months after notice, the plaintiff's right of entry accrued, and of course that from that time the defendant was a trespasser; whereas the acceptance of rent was evidence of the continuance of the contract, and a waiver of the trespass.

Lord KENYON said, that had the demise in ejectment been antecedent to payment of the rent, he should have held the receipt of rent a waiver of the trespass, and have nonsuited the plaintiff; but that in the present case, the demise in ejectment was on the 2d of *November*, which was subsequent to the receipt of rent; that though the plaintiff might have brought his ejectment at the end of the three months, there was no reason why he might not give an indulgence to the defendant, and bring his action

action even after the receipt of the rent, particularly as the premises were not then repaired.

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FRYETT ex dem HARRIS v. JEFFREYS.

The jury found a verdict for the defendant.

Garrow and *Wigley* for the plaintiff.

Baldwin and *Vaughan* for the defendant.

In the next term a new trial was moved for, and a rule obtained, which the Court afterwards discharged.

Vide *Doe* v. *Batten*, *Cowp.* 243. *Roe* v. *Minshull*, *Bull. N. P.* 96.

PERCHARD and HAMERTON, Sheriffs of London, v. TINDALL.

In a debt against the surety of a sheriff's officer, for his not paying over the levy-money, an indorsement on the writ by the officer, to this effect, "Discharge the defendant out of custody, I have received the money," is sufficient evidence to charge him with receipt of the money.

DEBT on bond.

Pleas, 1*st*, *Non est factum*; 2*d*, After craving oyer of the condition, which was for performance of covenants in an indenture between the plaintiff and one *Hyndes*, an officer of the sheriff, the material one of which was for the payment of all levy-money made by him, plea of performance.

The plaintiff replied a *ca. sa.* at the suit of one *Parker* against one *M'Donough*, issued and directed to the plaintiffs as sheriffs of *Middlesex*, and that they made their warrant directed to *Hyndes*, indorsed to levy 153*l.* 15*s.*; that *M'Donough* was in custody of the sheriff, upon a special *capias* at the suit of one *Adams*, and that *Hyndes* received of him the levy-money, which he did not pay over according to his covenant. There was a another breach assigned, under the stat. 8 & 9 *W. viz.* that *Hyndes*, a bailiff, received of *M'Donough* the sum of 153*l.* 15*s.*, omitting all the special circumstances, and that he did not pay it over, according to his covenant.

Rejoinder took issue on both, that *Hyndes* did not receive, &c.

To prove the facts stated in the replication, the plaintiffs proved an indorsement on the warrant by *Hyndes*, to the following effect: "Discharge the defendant in this action, I have received the within levy-money—*C. Hyndes.*" [395]

For the defendant, it was objected: that to prove this fact, *Hyndes*, himself ought to be called.

But this was over-ruled by LORD KENYON, as in fact, *Hyndes* was himself the defendant in the action. [396]

If such an indorsement is a receipt, and ought to be stamped. *Q.*

It was then objected by the defendant's counsel: that this indorsement was offered in evidence of receipt of money, and therefore ought to be stamped.

It

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PERCHARD and HAMERTON Sheriffs of London, v. TINDALL.

It was answered, that it was not a receipt for money, but an authority to the sheriff to discharge *M'Donough*, though it was sufficient to charge *Hyndes* with the receipt of the money.

LORD KENYON said, that he had doubts as to this point: but was disposed to think the evidence was admissible, and that he would therefore admit it, reserving however, to the defendant a right to move to set aside the verdict.

The plaintiff, however, afterwards, by another witness, proved the actual receipt of the money by *Hyndes*; and the jury found a verdict for the plaintiff.

Gibbs and *Jervis* for the plaintiff.

Erskine and *Baldwin* for the defendant.

GROOME v. POTTS et alt. Executor of JOHN NEAL.

An action for money had and received will not lie to recover the allowance of a bankrupt, under stat. 5 *Geo.* 2. *c.* 30.

THIS was an action for money had and received, and on account stated.

Plea of the general issue *non assumpsit.*

In the year 1788 the plaintiff had become a bankrupt. *Neal* was chosen assignee of his estate, which had paid a dividend of 12*s.* 7½*d.*; and the action was brought to recover a sum of 37*l*, being an allowance of 7½ *per cent.* on the dividends given by stat. 5 *Geo.* II. *c.* 30.

The plaintiff proved the commission and dividend made, and there rested his claim.

Vaughan, for the defendant, contended, that the action could not be maintained, the assignees having paid away all the money [397] arising from the bankrupt estate, under an order for a dividend, and that the bankrupt could not therefore call further upon them, as the assignees were, by their covenant, bound to account, and when the order was made for a dividend, were bound to pay, or to be subjected to an action for a breach of covenant; besides that, each creditor might maintain an action against them for his share, after the dividend had been declared.

LORD KENYON was of that opinion. His Lordship added, that the assignees were mere instruments in the hands of the commissioners, for the purpose of distributing the bankrupt estate, and were bound to pay to the extent of the order made for

for a dividend: and that if the bankrupt had any redress, it was, by application to the Great Seal, the action in the present shape not being maintainable.

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GROOME v. POTTS, et alt. Executor of JOHN NEAL.

The plaintiff was nonsuited.

Garrow and *Shepherd* for the plaintiff.

Vaughan for the defendant.

In the next term the plaintiff moved for a new trial, and that the nonsuit should be set aside, which was refused, the Court concurring in his Lordship's opinion. [398]

Vide *Brown* v. *Bullen*, *Dougl.* 392.

PHILLIPSON v. LEIGH.

Thursday, Dec. 3d.

To an action on an agreement to take,—*Q.* If it is a good defence, that the house was burnt before the party could take possession?

THIS was an action on the case, brought on an agreement for the letting of a house in *Hanover-square*. The declaration stated the agreement to take the house from the 1st of *November* 1794, and then assigned the following breaches: The first was, for not taking the house pursuant to the agreement; the second was, for the occupying the house, and not paying the rent for half a year. There was another count, generally, for use and occupation.

The case relied on for the defendant was, that the agreement for the house was made on the 2d of *November*, to commence on the 20th of the same month, and that before the time when the defendant was to take possession, a fire broke out in it, by which he was prevented from occupying.

For the defendant was cited *Brown* v. *Quilter*, before Lord NORTHINGTON, in *Andrews*, and another case before Lord BATHURST, wherein it had been held, that where the house was consumed by fire, the tenant would be discharged from payment of the rent.

The counsel for the plaintiff insisted, that notwithstanding the fire, the defendant was liable at law; and cited *Monk* v. *Cooper*, *Stra.* 763; and *Balfour* v. *Weston*, 1 *Term Rep.* 310.

Lord KENYON having looked into the case in the *Term Reports*, said, that sitting at *Nisi Prius*, he was unwilling to hold any thing contrary to it, though it differed from the case of *Brown* v. *Quilter*; but that he was disposed to be of opinion with Lord NORTHINGTON, who was a very great lawyer.

It

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It being proved that the house was put into complete repair by the month of *April*, and had been since unoccupied, it was agreed to refer the cause.

Gibbs and *Vaughan* for the plaintiff.

Law for the defendant.

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Friday, July 4th.

PARRY, Gent. v. COLLIS.

In an action by an attorney for words reflecting on him in the conduct of a cause, the proceedings, &c. in the cause must be produced in evidence.

THIS was an action on the case, for defamation.

The declaration stated, that the plaintiff was an attorney of the Court of King's Bench, and had been employed by the defendant as his attorney, to defend an action, wherein one *George Wenham Lewis* had been plaintiff, and the present defendant had been the defendant.

It then averred, that the defendant, speaking of the plaintiff's conduct in the said cause, used the following false and scandalous words: "I have got rid of one damned rogue in *Willey* (meaning one *William Willey*, who had been before concerned for him as attorney); and I have got a damned deal bigger one in *Parry* (meaning the defendant)."

The several counts laid the words differently; but in all of them the words were laid to be spoken of the plaintiff, as relating to his conduct in the above cause.

The plaintiff proved the speaking of the words.

He then called a witness to prove, that in the conduct of the cause of *Lewis* against the present defendant, Mr. *Parry*, the plaintiff, had conducted himself properly, carefully, and for the interest of his client.

Garrow for the defendant, objected to his giving any evidence as to the conduct of that cause, until he had shewn the proceedings in the cause itself.

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Nor is it sufficient to dispense with the production of them that the costs have been taxed, and all the papers given up.

It was answered, that the costs had been taxed and paid, and of course all the papers given up to the defendant, in whose possession they said the issue then was; and they then gave in evidence a notice to the defendant, to produce all papers, writings, &c. in the cause.

Lord KENYON said, that was not sufficient, as the words were said as spoken of the plaintiff in the conduct of a certain action; that action was the ground-work of the inquiry, and its existence ought to be proved; that he presumed the roll had been carried

in

in, to which the defendant might have had access, and given a copy in evidence; and this was not to be supplied by the notice to produce the papers, &c.

The plaintiff was going to be nonsuited, when the defendant's counsel offered to waive their right to a nonsuit, and to withdraw a juror, on condition of all further proceedings being put an end to, at the same time apologizing to Mr. *Parry* for the words, which was agreed to by the parties.

Erskine and *Marryat* for the plaintiff.

Mingay and *Garrow* for the defendant.

SITTINGS AFTER TERM AT GUILDHALL. [401]

SEDDON *v.* TUTOP.

Thursday, Dec. 10th.

Where there has been judgment by default in an action upon a bill of exchange, and also for goods sold and delivered, and the plaintiff, by mistake, takes a verdict but for one of his demands, he may afterwards maintain an action for the other.

ASSUMPSIT for goods sold and delivered.

Plea of a judgment recovered.

Replication, that the several promises and undertakings in the declaration mentioned, were not the same promises and undertakings for the non-performance whereof the said sum of money was so recovered by the said judgment, as in the said plea was by the said defendant, in pleading above alleged.

The circumstances of the case were, that the defendant, being indebted to the plaintiff in a sum of 76*l.* for goods sold at different times, and forming two distinct bills, had, for the first of these given to the plaintiff a bill of exchange for 51*l.* This bill not being paid, the plaintiff brought an action, and declared on the bill of exchange, and generally for goods sold and delivered, among other counts. The defendant let judgment go by default; and on the execution of the writ of inquiry, the plaintiff's attorney only went into evidence on the bill of exchange, having forgotten the demand for the goods, and took his verdict for 51*l.*, the amount of it only. Having discovered his mistake, the present action was brought to recover the value of goods sold. [402]

For the defendant, it was relied, that both demands, in fact, subsisting at the time of the action brought, and the declaration including a count for goods sold, the record was conclusive evidence, and prevented the plaintiff from going into evidence respecting

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specting the demand. As a further corroboration, it was stated that the defendant in the present action was arrested for the whole of the original demand, and held to bail for 76*l.*

Per Lord KENYON. In this case, the justice of the case corresponds with the law. It is admitted that 76*l.* was due from the defendant to the plaintiff, and that 51*l.* has been recovered. When a man brings an action, it must be presumed that it is for the whole of his demand; but it is not conclusive; he may shew, that in point of fact, he did, in such action, go to recover part of the demand only. He may also shew that he did not, under the first action, before the Jury go into any evidence of that demand which is the object of the second action; for if he did, and failed, it would be conclusive. I am therefore of opinion, that it is competent for the plaintiff now to shew, that no part of the present demand was included in the former verdict.

A witness for the plaintiff then proved that he was clerk to the attorney for the plaintiff, and had attended the execution of the writ of inquiry, and, in fact, had only proved the bill of exchange, and had given no evidence whatever on the account of the goods sold.

[403] The jury found a verdict for the plaintiff.

In the course of the cause, *Mingay* called the plaintiff's attorney, to prove that, in the present action, the defendant had been arrested for 76*l.*

Lord KENYON said, he could not ask him as to the fact; the writ should be produced.

Erskine and *Baldwin* for the plaintiff.

Mingay for the defendant.

In the next term, the defendant moved for a new trial; and the Court seemed to entertain considerable doubts as to this case. *Markham* v. *Middleton*, *Stra.* 1259, was relied upon; and they seemed disposed to set aside the execution of the writ of inquiry: but in *Easter* term the cause came on to be argued, when the Court concurred with Lord KENYON's opinion, as here delivered, and the rule for a new trial was discharged.

Vide *Kitchen* v. *Campbell*, 2 *Black. Rep.* 827. 2 *Wils.* 304.

1795.

Leigh et alt. v. Banner.

An agreement between merchants, that one shall take a share in the outfit of a ship and the adventure, is not an agreement for the sale of goods with the proviso of the statute requiring a stamp of agreements.

THIS was an action on the case, on a special agreement, by which the defendant agreed to take part in an adventure on a ship, freighted from *London* to *Newfoundland*, and from thence with a cargo of fish, to *Leghorn*.

The plaintiff proved the freighting of the ship in the month of *May* 1792; and to prove the defendant's engagement, produced a letter from him, addressed to the plaintiff, by which he agreed to become concerned to the extent of one-fourth of the adventure.

The ship was lost, and the defendant refused to pay his share of the loss.

When the letter was produced, it was objected: that being offered in evidence of an agreement, and not being stamped, it ought not to be admitted.

To this it was answered, that this was within a proviso of the statute, which exempts all agreements between merchants for the sale of the goods from being stamped. [404]

Lord KENYON said, that this was clearly an agreement, and not for the sale of goods, and so not within the saving of the statute.

The plaintiff was going to be called, when it was suggested, that contracts, such as the present, were exempted from stamps by another statute.

Lord KENYON asked where the parties lived; and being answered in *London*, said, that the latter statute had exempted agreements between merchants from stamps only, where they lived at a distance of fifty miles, which here was not the case; and the plaintiff was nonsuited.

Erskine and *Giles* for the plaintiff.

Mingay for the defendant.

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Miles et alt. v. Dawson.

Monday, Dec. 14th.

Under a subpœna *duces tecum* a witness is not compellable to produce private papers in his custody.

TRESPASS for seizing the plaintiff's ship on the coast of *Africa*.

A witness was called, to produce a power of attorney in his possession, he having been served with a subpœna *duces tecum*.

He appeared, but did not produce his paper, pursuant to his subpœna.

Gibbs

1795.

MILES et alt. v. DAWSON.

Gibbs, of counsel for the plaintiff, insisted, that the witness being served with a subpœna *duces tecum*, was obliged to produce every paper in his possession, so as that paper did not criminate himself.

Lord KENYON denied that position, and said, that they could not compel the witness to produce the warrant of attorney. If that was the case, every man would be obliged to produce every paper in his custody. It would occasion the ruin of millions. His Lordship added, that it is a good plea in bar in the Court of Chancery, that the defendant (although the legal title was in another) had an equitable title by honest means, without notice; and the Court would not compel the production of those papers which, if produced, would strip the defendant of his fair and equitable title.

[406] His Lordship then told the witness that he could not compel him to produce the warrant of attorney, but that he might do as he pleased; and the witness refused to produce it.

Erskine, *Gibbs*, and *Marryatt* for the plaintiff.

Law, *Wood*, and *Giles* for the defendant.

Same day.

ROTHWELL v. HUMPHREYS and HOWELL.

Money lent to one partner, for his own expences while engaged in the partnership business, shall be deemed a partnership debt.

ASSUMPSIT for money lent.

Plea of the general issue.

The defendants were partners, linen-drapers, in *London*; the plaintiff was a fustian manufacturer at *Manchester*. *Howell*, one of the defendants had gone down to *Manchester*, to purchase goods in the way of his trade, and had, in fact, purchased from the plaintiff to the amount of 500*l*. Being about to return, he borrowed 10*l*. from the plaintiff, to defray his expences to *London*; and having drawn a bill on the house in *London* for the amount of the goods, he included in it the 10*l*. so borrowed; and the bill was drawn for 510*l*.

Before the arrival of the goods in *London*, *Humphreys* and *Howell*, the defendants, became insolvent, and the plaintiff stopped the goods *in transitu*; so that the bill was never presented; and the action was brought to recover the 10*l*. lent only.

These facts were proved by a witness called by the plaintiff.

The defence relied upon was, that the action was brought against both partners for a loan of money, admitted by the evidence

dence, to have been made to one of them; and which therefore could not be supported.

*Lord KENYON said, that though the loan of money was to one of the partners, it was lent to him while employed on the partnership business, and on its account; that as such, it was competent to him to bind the partnership to the payment of a debt [*407] so contracted, and which, in fact, he had done, by including the money lent in the same bill with that for goods sold clearly on the partnership account.

Verdict for the plaintiff.

Erskine and *Wigley* for the plaintiff.

Gibbs and *Espinasse* for the defendants.

WEBSTER et. alt. v. FOSTER.

Tuesday, Dec. 15th.

What shall be a concealment of circumstances sufficient to avoid a policy.

THIS was an action on a policy of insurance on the ship *Caroline*, from *Liverpool* to the *Baltic*, with salt, and back again to the port of *London*, dated the 23d of *October* 1794.

In *August* 1794, the plaintiffs effected a policy on the ship in question, at *Hull*, for 600*l*.

The ship was then at *Belfast* in *Ireland*. She returned from thence, after effecting the policy, and sailed from *Liverpool* on the 7th of *September*, and was captured on the 19th of the same month.

For the plaintiffs, it was stated, that being in *London* on the 13th of *October* following, and finding themselves under-insured, they had written to their correspondent in *Hull* to effect a further insurance; that in consequence of a correspondence between them and their correspondent there, who at first declined effecting the insurance, on account of the premium being much [408] advanced, the policy was not effected till the 23d of that month. It was also stated by them, that the master of the *Caroline*, though captured on the 19th, had been carried into *North Bergen*, and that they had not heard from him till the 30th of *October*.

The broker who effected this insurance was called; and he stated, that in answer to the inquiries of the defendant and the other underwriters, respecting the sailing of the ship, he had answered, that he knew nothing about her, having received no information on the subject from the plaintiff.

Erskine, for the defendant, contended, that this policy was clearly void. He stated, that there was a regular list, called the *Sound*

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Sound List, which contained an account of all ships which go to the *Baltic*, all of whom touch at *Elsineur* to pay the *Sound* duties; that the voyage from *England* thither could be performed in from fourteen to eighteen days, and the list be brought to *England* in ten or twelve. From thence he inferred that the plaintiffs must, long before the effecting of the policy, have known whether the *Caroline* was a missing ship or not, she having sailed from *Liverpool* the 7th of *September*; not one circumstance of which they had communicated to the underwriters.

Lord KENYON then observed, that there was another circumstance which appeared to him to be decisive against the policy, [409] which was, that though the vessel had sailed near six weeks before the plaintiffs gave instructions for the policy, they had not communicated this circumstance to the broker, but had been completely silent on the subject; that the circumstance of their being then in *London* when the policy was effected, was remarkable, for they had not attempted to effect the policy in *London*, where the circumstance might probably be inquired into, but had chosen to give orders, by letter, to have the policy done at *Hull*, and cautiously avoided saying any thing as to the sailing of the vessel. That was an attempt at evasion, and a concealment of circumstances sufficient to avoid the policy.

The jury, which was a special one, concurred with his Lordship.

The plaintiff was nonsuited.

Gibbs and *Park* for the plaintiffs.

Erskine and *Russell* for the defendant.

Vide *Seaman* v. *Fonnereau*, 2 *Stra*. 1183. 3 *Burr*. 1909.

Wednesday, *Dec*. 16th.

DOXON v. HAIGH et alt.

When a deed is in possession of the defendant, who has notice to produce it, but does not, an examined copy is evidence, without proof of the defendant's execution of it.

THIS was an action on the case, on a special agreement. Plea of the general issue.

The agreement as stated, was, that the plaintiff, being a creditor of *Swan* and *Oddie*, and they having become insolvent, had assigned all their effects to the defendants, as trustees, for the general benefit of their creditors; and the plaintiff having refused to come in, the defendants, in order to prevent the deed from being

being defeated, had entered into an agreement to secure to them by good bills 2400*l.* part of a debt of 3000*l.* The declaration then averred, that in pursuance of such agreement, and by the direction of the defendants, the plaintiff had drawn bills on *Gibson* and *Johnson*, which had not been accepted; by reason whereof the defendants became liable, under the agreement, to secure to him so much money. [410]

The plaintiff had given notice to the defendants to produce the composition-deed.

The defendants denied having it.

The plaintiff then offered a copy; and to make it evidence, proved, that the deed had been in the possession of Mr. *Bolton*, who had been attorney to *Haigh* the defendant; and a clerk to the attorney, for the plaintiff, proved that he had examined the copy offered in evidence with the original with a clerk of Mr. *Bolton*.

Mr. *Bolton* was himself called, and stated, that he had had the deed in his possession, and that he had searched, but could not then find it; and rather believed that he had handed it over to *Haigh* the defendant.

Mingay for the defendants, contended, that this did not make this attested copy evidence, for that it was necessary to prove the execution of the original by the defendants.

Lord KENYON said, That it was not necessary. If the original itself had come out of the defendants' hands, it would not have been necessary to have called the subscribing witness; and the case of its being a copy could not vary the rule. [411]

Though there are more parts of a deed than one which is in the defendant's possession, but who does not produce it after notice, the plaintiff is not obliged to produce in evidence one of the originals, but may give a copy in evidence.

Mingay then asked if there were not more parts of this composition-deed than that proved to have been in Mr. *Haigh*'s possession? and proposed to prove that there were; and that if so, the plaintiffs should have produced one of them, and could not give a copy in evidence.

Lord KENYON ruled, that though it appeared that there were other parts of this deed, yet if they were not accessible to the plaintiff, he would admit the copy in evidence.

It was accordingly admitted and read.

In the course of the cause, a witness was called for the plaintiff. In the course of his examination, a question was asked. He appealed to the Lord Chief Justice, whether he was bound to answer it, as the answer might subject him to the payment of a sum of money.

Mingay told him, that he need not answer it.

Lord

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DOXON v. HAIGH, et alt.

*A witness is not bound to answer a question, the answer to which may obliquely charge him, when there can be no other direct evidence against him of a demand.

*Lord KENYON said, that generally a witness being subjected to a civil right, in consequence of an answer to a question put to him, would not warrant him in refusing to answer, as the rule was rather confined to a criminal one. But a witness should not be asked a question which might charge himself obliquely by his answer, where there could otherwise be no direct evidence or charge against him.

The plaintiff having failed in proving any undertaking in writing, under the statute of frauds, was nonsuited.

Erskine, *Gibbs*, and *Giles* for the plaintiff.

Mingay and *Shepherd* for the defendants.

Vide *Rex* v. *Middlezoy*, 2 *Term Rep*. 41.

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Thursday, Dec. 17th.

LEIGH v. MATHER.

What is the construction of the words in a policy of insurance, "to —— and until moored 24 hours in safety."

THIS was an action on a policy of insurance on the ship *Palliser*, at and from *Georgia* to *Jamaica*, and till moored twenty-four hours in safety. The policy was on the ship and goods.

The ship sailed from *Georgia*, and arrived at *Montego-Bay*, in the island of *Jamaica*. She remained there for nearly a month, and then sailed for *St. Ann's*, in that island, and was lost in her passage thither.

The defence was, that the policy ended on the ship's arrival at *Montego-Bay* and remaining there twenty-four hours, and that the loss was therefore not within the policy, it having happened after her departure.

Erskine for the plaintiff, contended, that the policy being in general terms "to *Jamaica*," that it meant to include all the ports in that island to which any part of her cargo was to be delivered; and contended that it was matter of evidence to shew
[413] to what port in fact, she was bound. He contended, that in this respect there was a difference where the policy was on the ship and on goods, and that the policy would cover the latter, though not the former.

Lord KENYON said, that where a ship is insured to any particular port of delivery, if, by stress of weather, she is forced into a different port, and there discharges part of her cargo, and afterwards proceeds to her port of delivery, he was of opinion

5 that

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that the policy remained good; but that where a ship, under a general policy to *Jamaica*, and until moored twenty-four hours, came to any port, and there voluntarily remained, and discharged part of her cargo, such, in his opinion, put an end to the policy after remaining there twenty-four hours, whether the policy was on ship or on goods. His Lordship, however, left the jury to state their ideas as to the policy.

The jury said, that when a person insured goods to a particular port, though the ship might touch at another port, and remain there for twenty-four hours, that, notwithstanding, the policy remained in force; but that where the same person insured both ship and goods, as in the present instance, there, by the touching at any port and remaining there twenty-four hours, the policy was discharged as to all other ports.

Lord KENYON assented to this distinction, and the plaintiff withdrew his record.

Erskine and *Giles* for the plaintiff.

Law, *Gibbs*, and *Park* for the defendant.

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AKERS v. THORNTON.

Friday, *Dec.* 18th.

In an action on a policy of insurance against the insurer, other underwriters, whose names are on the policy, are competent witnesses, as well to general facts arising on the policy as to discredit the testimony of a witness upon whose evidence, as to a representation, a former verdict on the same policy had been obtained.

ASSUMPSIT on a policy of insurance on the ship *Douglas*, from *St. Vincent's* to *London*. Lost by capture.

The policy was underwritten on the 10th of *May*; the vessel had sailed from *St. Vincent's* on the 15th of *March*.

The underwriters had contested the payment of this loss, on the ground that they had not been informed at the time of their subscribing the policy, that the ship had sailed the 15th *March*, as in such case, they contended, she would have been deemed a missing ship, and so would not have been underwritten for the common premium.

A witness of the name of *Wallis* had been the broker, who had effected the policy, and swore that he had informed the underwriters of the circumstance of the ship's sailing on the day mentioned.

The cause tried immediately before the present was a cause of *Akers* v. *Akers*; the same defence had been made, *Wallis* had given the same testimony, and the jury had found for the plaintiff.

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To prove that no representation, as stated by *Wallis*, had been made, *Law* called several of the underwriters, whose names were on the policy.

Erskine objected to their testimony. He admitted that the case of *Burt* v. *Baker*, 3 *Term Rep.* 26, had decided, that one underwriter might be a witness in an action on the policy; but contended, that this case did not come within the rule established in that: first, because the underwriter did not come merely to prove a question on the policy, but to endeavour, by his evidence, to destroy the credit of *Wallis*'s testimony; and, secondly, That as a verdict had been given in the preceding cause, on the evidence of *Wallis*, if he was discredited by the verdict of this, the former verdict could not stand, nor any future one be recovered against the underwriters, who were now offered as witnesses.

Lord KENYON said, that the case of *Burt* v. *Baker* had been decided on much deliberation, and had established the competency of underwriters being witnesses on cases respecting policies which they themselves had subscribed; that though the objection left their interest in a strong point of view, as matter of observation on their credit; yet still, under the authority of that case, he must receive their testimony.

They were received; but the jury found a verdict for the plaintiff.

Erskine, *Shepherd*, and *Giles* for the plaintiff.

Law and *Gibbs* for the defendant.

Burt v. *Baker*, 3 *Term Rep.* 26. and Case, *ibid.*

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BURNETT *v.* KENSINGTON.

Same day.

What is the legal construction of the usual words in policies of insurance, "Free from average, unless the ship be stranded." Q.

THIS was an action on a policy of insurance on a cargo of fruit shipped at and from *Malaga* in *Spain*, to *Plymouth* or *Portsmouth*.

The question turned on the usual exception at the bottom of all policies of insurance, "Fruit, &c. to be free from average, unless general, or the ship be stranded."

The loss in question was claimed, as having arisen from the "ship having been stranded."

The facts of the case, as they appeared in evidence, were, that the ship sailed from *Malaga* on the 30th *November* 1794. On the

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the 8th of *January* she put into *Crookhaven*. She sailed from thence on the 27th, and on the same day made the *Land's End*. On the 29th, in coming up the Channel, she drove on a ridge of rocks, which broke part of her bottom; and though perfectly dry during the whole preceding part of her voyage, she became so leaky, that notwithstanding the pumps were kept continually working, she had between two and three feet water in her hold.

By a fortunate shifting of the wind she was got off, but so leaky, that the pilot ran her on shore in *St. Mary's Bay*, where the cargo was taken out and the vessel repaired. Thirty chests of oranges were found to be spoiled; and the ship afterwards proceeded to her port, and discharged the rest of her cargo. [417] The action was brought to recover the value of these chests of oranges.

Where a cargo of fruit is found to have suffered a loss after the ship has been stranded, it must be taken to be within the policy, from whatever cause the injury may have arisen.

In the course of the evidence, *Erskine* examined a witness for the defendant, who was the captain of the vessel, whether the loss of the oranges arose from the sea, or from the decay to which that kind of fruit was peculiarly subject.

The plaintiff objected to it.

Erskine contended, that the loss of the goods must appear to proceed from the stranding, otherwise the loss was not within the policy.

Lord KENYON ruled, that it was not to be canvassed, under this clause in the policy, from what cause the injury to the cargo proceeded: but where the ship was stranded, it must be ascribed to the stranding, and be taken to have arisen from that; so that the injury was covered by the policy.

It then became a question, Whether this was a stranding of the vessel within the policy?

Gibbs, for the plaintiff, contended, first, that any casting of the ship upon any solid body, over which the sea flowed, whether it was sand, gravel or stone, was a stranding of the vessel; and from thence he concluded, that the ship's running on the shoal of rocks was a stranding.

But if that was doubtful, he insisted that the running the ship aground in *St. Mary's Bay*, being done by the master and mariner in the course of the voyage, and for the protection of the ship and cargo, was clearly a stranding within the meaning of the policy.

On the other hand, *Erskine*, for the defendant, contended, [418] that neither in the language of a sailor, nor according to the legal meaning of the term, as applied to policies of insurance,

 could

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could the construction contended for by the plaintiff be the true one.

If that was the construction, the clause would be useless, and the insurer liable in every case; for if the ship got aground in working out of harbour, or touched ground any where in the course of her voyage, though she afterwards completed it, that would be a stranding of the vessel, and would cover any average loss the fruit, &c. might sustain, and which might have arisen from any other cause.

He argued, that the clause was introduced in favour of the underwriters, to guard them from petty losses, on account of the perishable nature of these commodities; and instanced a case, which was an insurance on fish; which, though it came to the port of delivery putrid and totally unfit for use, yet was held not to be within the policy.

The construction, therefore, he maintained to be the true one of the stranding of a ship was, where she ran aground and bilged, so that her cargo was obliged to be taken out, and sent in other vessels to her port of delivery.

He concluded with observing, that if the bare act of running aground was to subject the underwriters, that they would be at [419] the mercy of every master of a ship, who, if he had a prospect of a bad market, might run his ship aground, and cover his losses by that means.

Lord KENYON said, that it was agreed on both sides, that no judicial determination had ever taken place as to the construction of this term; that he was not competent to give any opinion as to its import, but left the jury (which was a special one of merchants) to say what was the proper meaning to affix to it.

The jury found a verdict in these words: "We think this accident was attended with all the effects of stranding, and that the plaintiff is entitled to a particular as well as general average."

Gibbs, *Park*, and *Cowper* for the plaintiff.

Erskine and *Shepherd* for the defendant.

END OF MICHAELMAS TERM IN THE KING'S BENCH.

1795.

IN THE COMMON PLEAS.

SITTINGS AFTER MICHAELMAS TERM AT WESTMINSTER. [420]

Ford, Gent. *v.* Maxwell, Gent. *Dec.* 4th.

Where business has been done by an attorney for a client, who afterwards becomes himself an attorney, and is so at the time of the bill delivered, though not so when the business was done, the plaintiff, in an action for such bill, need not deliver a bill signed, stat. 2 *G.* 2.

THIS was an action on the case, brought to recover the balance of the plaintiff's bill for business done by him as a solicitor in the Court of Chancery.

The defence relied on for the defendant was, that no bill signed had been delivered to the defendant a month before the bringing of the action, under the stat. 2 *G.* II., which was a ground of nonsuit. The second ground of defence was, that the defendant had married a ward of the Court of Chancery; that the suit upon which the present demand arose was instituted there on that account, and several infants had been necessarily made parties; that an order was made referring the bill to the master to be taxed, who had taxed it accordingly; which bill the defendant had paid, and now insisted that the plaintiff could claim no more than what had been so allowed by the master.

To the first, it was answered, that the defendant was himself an attorney; and that, under stat. 12 *G.* II. *c.* 13, it was not necessary to deliver a bill to him.

Cockell, Serjeant, for the defendant, contended, that this statute only went to cases where the defendant was an attorney at the time of the business done: and then proved the defendant's admission as an attorney to have been in the course of the present year, and the business done long before his admission. [421]

Eyre, C. J. said that he would not decide the point at *Nisi Prius*, but would reserve it.

As to the second point, the Chief Justice asked, if in the case of a reference to the master, where costs are directed to be taxed, and infants are parties, the master, in such case, taxes the cause as between party and party, or as between attorney and client.

The counsel for the defendant then called the master's clerk, who swore, that in such taxation it was as between party and party.

Upon

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Upon this evidence his Lordship ruled, that the plaintiff was entitled to recover the difference of costs, as between attorney and client, from those as between party and party.

The plaintiff had a verdict accordingly.

Williams, Serjeant, and *Praed* for the plaintiff.

Cockell, Serjeant, and *Hunter* for the defendant.

In the next term the defendant moved for leave to enter up a nonsuit on the point reserved. The Court were of opinion, that the statute did not apply to cases only where the defendant was an attorney at the time of delivering the bill, though not so at the time of the business done; for the object of the statute being to prevent exorbitant charges, by giving time to have the [422] bill taxed, where the defendant was an attorney at the time of the bill delivered, that inconvenience could not happen. So the rule was refused.

HERBERT v. JONES.

Same day.

Where the cause of action is to recover any costs of expences which have been incurred in an action, and which is so stated in the declaration, the party cannot go into any evidence as to those costs, without producing the proceedings in such original action. Vide *S. P.* ante *Parry* v. *Collis*.

THE declaration in this case stated, "that the plaintiff having before that time brought an action for a certain sum then due and owing from the defendant to the plaintiff for work done, that whilst the said action was then depending, in consideration that the plaintiff would cause an arbitration-bond to be prepared, for the purposes of referring the charges for such work and labour to arbitration; and also in consideration that the plaintiff would proceed no farther in such action, the defendant undertook to refer the said account, and to execute the said arbitration-bond.

The declaration then averred, that the plaintiff had always been ready to refer the said account, and had arbitration-bonds prepared, but the defendant refused to execute the bonds, or to refer the several matters of the account.

There were other counts for work and labour, with the usual counts.

Plea of the general issue, with notice of set-off.

The plaintiff was a plasterer, and an action had been brought for work done for the defendant; the charges in it had been contested; and they were the object of the reference.

[423] The plaintiff proved the work done, and was proceeding to prove the expences in preparing the arbitration-bonds, and the necessary expences in attendances on the defendant and his attorney, together with the amount of his own attorney's bill in the cause.

Cockell,

Cockell, Serjeant, objected to going into this evidence, until the plaintiff had shewn the writ or proceedings in the original cause.

For the plaintiff, it was contended that the object of the first count was to recover damages for the defendant's refusal to refer the matters in dispute. After such agreement to refer the matters in dispute, an expence incurred in proceeding: this, therefore, was the ground of the action, and the proceedings in the cause only inducement.

EYRE, Chief Justice. The plaintiff, in his declaration, avers that a cause was depending, which the parties agreed to refer. The existence of a cause forms the foundation of the plaintiff's action, as in case there was no cause, there was no ground of action. It is therefore a material averment in the declaration, and must be proved, otherwise the plaintiff can only recover on the count for work and labour.

The plaintiff was not prepared with evidence to shew the proceedings in the cause, and therefore took a verdict for the work and labour only.

Adair, Serjeant, and *Espinasse* for the plaintiff.

Cockell, Serjeant, for the defendant.

SITTINGS AFTER TERM AT GUILDHALL.

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OXLEY *v.* YOUNG & alt.

Wednesday, Dec. 10th.

Under an agreement to accept a bill at the end of nine months, for goods to be shipped for abroad, it is necessary to give notice of the shipping.

THIS was an action on the case, on a special agreement. Plea of the general issue.

The agreement, as it appeared in evidence, was as follows:

Oxley, the plaintiff, was a manufacturer at *Norwich*, and in month of *February* 1793, he received an order from *Bistram* of *Gottingen*, for a quantity of goods to the amount of 260*l.* The letter from *Bistram* contained a direction to him to draw on the defendants for 130*l.* being one half of the amount of the goods to be furnished.

On receipt of this letter, the plaintiff wrote to the defendants, desiring their concurrence to his drawing on them for that sum. The defendants at first declined, but afterwards, by a letter dated the 12th of *February* 1793, they wrote to *Oxley*, that having received a guarantee, they were ready to accept a bill to the amount required

1795.

OXLEY v. YOUNG et alt.

required of 130*l.*, the bill to be drawn at the end of nine months from the date of the invoice of the goods, at three months' date.

The plaintiff answered this letter, by acceding to the terms of it, and accordingly, in the summer following, shipped the goods for *Bistram*, to the amount of 260*l.*, and at the end of nine months drew a bill on the defendants for 130*l.*, which they refused to accept.

[425] The action was brought for breach of the agreement to accept.

It was stated, and not denied, that on the 6th of *September* the defendants had written to *Norwich* a letter addressed to *Oxley*, to know what, or if any goods had been furnished. They received, at that time, no answer to it; and on the 10th of the same month they returned their guarantee. The reason of their not hearing was, that *Oxley* was then abroad at *Gottingen*, and had left no person to conduct his business at *Norwich*; for on the 1st of *October* they received a letter from *Oxley*, dated at *Gottingen* the 21st of *September* preceding, informing them that the goods had been sent.

The defence relied upon for the defendants was, that they had received no notice of the shipping of the goods from *Oxley*, which they contended was necessary; in consequence of which they had given up the guarantee, on the faith of which they had been induced to undertake the acceptance of his bills.

The counsel for the plaintiff relied, that no notice was necessary of the time of the shipping of the goods, their agreement being to accept a bill to be drawn at the end of nine months; and that the plaintiff had prematurely parted with his guarantee.

EYRE, Chief Justice, said, that as to the point respecting no-[426] tice, he had no doubt. It made no part of the original contract that notice should be given; and therefore he was of opinion that it was not necessary. That, as to the second part, it was more difficult, as it appeared they had written upon the 6th of *September*; and on the 10th, having received no answer, then returned their guarantee; that he was of opinion this was done too soon, and that the defendants, therefore, were not discharged, though perhaps it might be otherwise, if the defendants could shew any special damages from not having had notice.

The jury found a verdict for the plaintiff. Damages 130*l.*

Le Blanc, Serjeant, and *Sellon* for the plaintiff.

Adair, Serjeant, for the defendant.

FISHER,

1795.

Fisher, Gent. v. Leslie.

Same day.

An I. O. U. is admissible evidence of a debt without a stamp.]

THIS was an action of *assumpsit* for money lent, with the common counts.

Plea of the general issue, with notice of set-off.

To establish part of the demand claimed by the plaintiff, he produced a slip of paper signed by the defendant, in the following words; "I. O. U. eight guineas," and offered this in evidence, as proof of so much money due by him to the plaintiff.

Adair, Serjeant, for the defendant, objected to its being received. He said, that it was offered either as a promissory note or a receipt for money, for one or other of which it was intended to operate, and in either point of view required a stamp.

It was answered by *Clayton*, Serjeant, for the plaintiff, that it [427] was not offered in evidence in either point of view, as stated by the defendant's counsel; but as evidence of an account stated and settled between the parties, and a balance due from one party to the other. He compared it to the case of an account settled in the books of parties, and a balance struck, which had been always received as evidence *pro tanto*, without any stamp. To corroborate what he contended for, he gave in evidence a draft by the plaintiff on his banker, in favour of the defendant, of the same date with the paper offered in evidence, and for the same sum.

The Chief Justice said, that he was of opinion it was merely an acknowledgment of the debt, and neither a promissory note or a receipt; and admitted it in evidence.

The jury found a verdict for the defendant.

Clayton, Serjeant, and *Jackson* for the plaintiff.

Adair, Serjeant, for the defendant.

D'Israeli v. Jowett.

Saturday, Dec. 13th.

To prove the time of the sailing of a ship under convoy, the log-book of the man of war which convoyed the fleet is evidence.

THIS was an action on a policy of insurance to recover an average loss on goods shipped on board the ship *Nereid*, from *Leghorn* to *London*, warranted to sail with convoy.

The plaintiff proved that the ship sailed from *Leghorn* to *St. Fiorenzo* in *Corsica*, and from thence under convoy of the *Alcide* man of war to *Gibraltar*, where she arrived on the 4th of *August*. On

1795. D'ISRAELI v. JEWET. On the 12th, she sailed under convoy of the *America* for *England*; they were put back by contrary winds, and finally sailed on the 16th. She parted with her convoy off *Lisbon*, and arrived safely in the port of *London*, where the loss happened while she
[428] was unloading.

The captain, on his cross-examination, admitted, that during his stay at *Gibraltar* he had taken in a parcel of goat-skins and some wine.

By his manifest, dated at *Gibraltar*, he had stated his sailing to be on the 16th of *August*.

Upon these facts the defence was grounded, which was, that the ship was warranted to sail with convoy; that the convoy sailed on the 12th of *August*, whereas it appeared by the manifest, that the *Nereid* had not sailed till the 16th. This interval, it was contended, was taken up in taking in a cargo of goat-skins and wine, and that so the warranty was not complied with.

To prove the time of the sailing of the convoy from *Gibraltar*, the counsel for the defendant produced the log-books of the *America* and the *Alcide* from the Admiralty, by one of the officers of the Admiralty, where they were lodged.

Adair, Serjeant, objected to their admissibility.

EYRE, Chief Justice, said, that he had some difficulties as to the admissibility of this kind of evidence, and wished that the
[429] opinion of the Court was taken on it. In the present case, there was a difference as to the two ships; the *Alcide* was then lying at *Gibraltar*, and was not part of the convoy; the entries, therefore, on her log-book, were only entries of the transactions on board that particular ship, and could not therefore be admitted in evidence. But his Lordship observed, that the case of the *America* was different. The captain of the *Nereid* had stated, that he had put himself, at *Gibraltar*, under the convoy of the *America*. As the motions of the fleet were therefore to be directed by her, he was of opinion, that the log-book of the *America* was evidence; and his Lordship admitted it accordingly.

Entries in it were also read as to other transactions of the fleet, while under convoy of the *America*.

As to the defence, the Chief Justice observed, that he doubted whether, in case the defendant had made out in evidence, as he stated it, it would have been sufficient, as the ship had ultimately and effectively sailed with convoy on the 16th of *August* pur-

 suant

suant to the warranty; but as the captain had sworn that he had actually sailed with the convoy on the 12th, and there was no evidence to contradict it, the point could not arise.

The jury found a verdict for the plaintiff.

Adair, Serjeant, *Wood*, and *Wigley* for the plaintiff.

Le Blanc and *Heywood*, Serjeants, for the defendant.

[430]

DE SYMONS v. MINCHWICH.

Monday, Dec. 15th.

Where a tradesman gives credit for goods at the time of the sale, he cannot bring an action till the time given expires. But if the time was given after the sale, or if the sale was not *bonâ fide*, the party may sue for his debt immediately.

ASSUMPSIT for goods sold and delivered.

One part of the defence was, that the action was brought before the time given for credit was expired.

In the course of the evidence, it appeared that the plaintiff had sold jewels to the defendant to the amount of 500*l.* for ready money, as the plaintiff asserted; but as a witness for the defendant proved, on information from the plaintiff himself, to be paid for the 1st of *November* subsequent to the bill of sale; before which time, namely, on the 22d of *October*, the action had been commenced.

To rebut this defence the plaintiff proved, that almost immediately after the sale, the defendant had pawned the jewels with different pawnbrokers; and that suspecting the defendant not to be the person he represented himself, he had arrested him before the time alluded to.

EYRE, Chief Justice. If the credit given was voluntary, subsequent to, and not making any part of the original contract, it certainly might at any time be retracted; but if it made part of the contract, it is so material a part of it, that if the action be brought *within* the time limited for credit, it cannot legally be supported, unless it was not a *bonâ fide* purchase at the time by the vendee. For if he meant to impose on or defraud the vendor of his goods, the defence will not avail. But those are circumstances for the consideration of the jury only; to whom he left it.

The jury (which was a special one) found a verdict for the defendant. [431]

SIMPSON

1795.

Monday, Dec. 15th.

Simpson *v.* Hill.

The merely giving a person in charge to a peace officer, where the officer never takes the person of the defendant into custody, is not an imprisonment which will support an action.

THIS was an action of assault and false imprisonment.
Plea of the general issue.

The imprisonment complained of was, that the defendant sent for a constable, to whom he gave the plaintiff in charge; but the constable never touched the plaintiff, or took her into custody, or used any words expressing that she was a prisoner; for the defendant, on seeing her frightened, said to the constable, that he would not trouble him further at that time; and the constable departed.

Bond, Serjeant, for the plaintiff, contended, that this was a coercion of the plaintiff's liberty, by reason of the charge; for that during that interval, she could not go where she pleased; and so was an imprisonment, which would support the action.

Eyre, Chief Justice. If the constable, in consequence of the defendant's charge, had for one moment taken possession of the plaintiff's person, it would be, in point of law, an imprisonment, as, for example, if he had tapped her on the shoulder, and said, "You are my prisoner;" or if she had submitted herself [432] into his custody, such would be an imprisonment; but the merely giving her in charge, without any taking possession of the person, where nothing more passes than merely the charge, is not, by law, a false imprisonment. And as, in the present instance, the constable did never take her into custody, and the defendant withdrew his charge almost as soon as it was given, such is not, by law, an imprisonment.

The jury found a verdict for the defendant.

Bond, Serjeant, and *Venner* for the plaintiff.

Adair, Serjeant, and *Cockell*, Serjeant, for the defendant.

Tuesday, Dec. 16th.

King *v.* Scrape.

Where a party insured numbers in the lottery with A., who reinsured them with the defendant for his own security, in which he had a profit, such party cannot maintain an action against the defendant for money had and received.

CASE for money had and received.
Plea of the general issue.

The action was brought to recover several sums of money,

stated

stated to have been paid by the plaintiff to the defendant, for illegal insurances in the lottery in the years 1793 and 1794.

A witness of the name of *Felton*, called by the plaintiff, proved that he, in the begining of the lottery, contracted with the defendant to insure for each day of the drawing at a settled price of insurance for each day; that he made insurances with different persons, on his own account, which he had re-assured with the defendant, reserving to himself a certain profit *per cent.*

[433] He then proved, that *King* the plaintiff, as well as other persons, insured the several numbers which he mentioned, with him (the witness), which he daily re-assured with *Scrape* the defendant; but added, that he never informed *Scrape* of the persons whose numbers he had insured. This transaction was in 1794.

A witness, called also by the plaintiff, proved that in 1793, *King* had insured in that year with *Scrape*, but that on the balance of the account, the plaintiff was in the defendant's debt; the sums paid by the defendant having exceeded the money received as premiums. With this evidence they closed their case.

Adair, Serjt. This is an action for money had and received. There is no evidence of any contract between the plaintiff and the defendant upon which the action can be founded. The money was paid to the witness *Felton*, and the contract was with him. The plaintiff should therefore be nonsuited.

For the plaintiff was cited *Clark* v. *Shee*, *Cowp.* 197; and insisted that the action was maintainable, and the witness was to be deemed as agent to the defendant.

EYRE, Chief Justice. The case cited does not come up to the present. There the plaintiff's money was paid over to the defendant by the plaintiff's servant; the property passed directly from the plaintiff to the defendant, and he could follow it into the defendant's possession. But in the present case, the property is changed by the intervening contract with *Felton*, and became vested in him: there is therefore no contract with the defendant [434] in this action.

Though there may be some doubt as to the situation of the witness, whether he was not the agent of the defendant, and the money paid to him for the defendant's use; yet, as there is no direct evidence offered to support it, it must be taken from the evidence of *Felton* to be otherwise, and the transaction to have been on his own account.

As

1795.

King *v.* Scrape.

As to the transaction in 1793, as it there appears, that after payments and allowances on both sides, there was a balance in favour of the plaintiff, he therefore can have no right to maintain an action for money had and received, as he had in fact received more money than he paid.

The plaintiff was nonsuited.

Bond, Serjt., and *Lawes* for the plaintiff.

Adair, Serjt., and *Le Blanc*, Serjt. for the defendant.

END OF MICHAELMAS TERM, 36 GEO. III. 1795.

CASES

ARGUED AND RULED

AT

NISI PRIUS,

IN THE

KING'S BENCH;

IN HILARY TERM, 36 GEORGE III. 1796.

SITTINGS AFTER TERM AT WESTMINSTER.

BAILLIE et alt. *v.* LORD INCHIQUIN.

Saturday, Feb. 13th.

A general acknowledgment shall be sufficient to take a demand out of the statute of limitations. If the acknowledgment applied to a different debt from that for which the action is brought, proof of that shall lie on the defendant.

THIS was an action of *assumpsit*, brought to recover the amount of a bill of exchange, dated the 3d day of *February*, in the year 1777, drawn by Sir *Thomas Wallace Dunlop* on the defendant and Lord *Cork*, in favour of the plaintiff, for 507*l.*

The defendant pleaded the general issue, and the statute of limitations; to which was the usual replication.

The bill, at the time the action brought, was of near nineteen years standing, which was relied upon by the defendant's counsel, as affording the strongest presumption that the debt had been satisfied, the defendant having been at all times in a situation to be sued for it.

To support a new promise within the six years, the plaintiffs relied, that the defendant having become much involved, had assigned his estate to trustees for payment of his debts; and in answer to an application for payment of this money in the year 1792, had written the following letter to the plaintiffs:

"I received your letter, and beg leave to refer you to my trustee,

1796. — BAILLIE et alt. v. Lord INCHIQUIN.

trustee, Mr. *H. Wall* of *Paper Buildings*, on this complicated business. I should be glad to be informed how you have settled it with Lord *Cork*.

I am, &c. *Inchiquin*."

But they gave no evidence whatever of this trust, but relied merely on the letter.

Garrow, for the defendant, contended, 1*st*, That this letter, being in general terms, could not be applied to the debt in question, which was necessary, in order to raise a new promise; but 2*dly*, That the letter did not contain an acknowledgment.

Lord KENYON ruled, that where a debt was established against a defendant (as here it was, by proving the hand-writing of the defendant to the bill) who relied on the statute of limitations, if the plaintiff gave any general evidence of acknowledgment, that it should be taken to apply to the debt in question; and that it should lie on the defendant to explain the promise so made, and shew that it applied to some other demand. In the present case [437] the demand was established; and the bill being drawn on Lord *Cork*, and his name being mentioned in the letter, fortified the construction that this letter applied to the demand on the bill in question. As to the letter, his Lordship thought that it was an acknowledgment.

The defendant called no witness, and the plaintiff had a verdict.

Erskine and *Adam* for the plaintiff.

Garrow and *Espinasse* for the defendant.

HERIOT *v.* STUART.

Wednesday, Feb. 17th.

A paragraph in one newspaper, charging another with being vulgar or scurrilous, is not actionable; but *aliter*, where it asserts it to be low in circulation, as addressed to persons who are disposed to advertise in it.

THE plaintiff was proprietor of a newspaper, called the *True Briton*. The defendant was printer of another paper, called *The Oracle*; and the action was brought for a libel inserted in the latter paper concerning the former.

The libel was in the following terms, in the form of a paragraph in the *Oracle*:

" *Times* versus *True Briton*.

" In a morning paper of yesterday was given the following character of the *True Briton*: that " it was the most vulgar, ignorant, and scurrilous journal ever published in *Great Britain*." To the above assertion we assent; and to this account we add, that the first proprietors abandoned it, and that it is the lowest

now

now in circulation; and we submit the fact to the consideration of advertisers." 1796.

HERIOT v. STUART.

Erskine, for the plaintiff, admitted that the first words, charging *it with scurrility, &c. were not actionable; but that the latter were, inasmuch as they affected the sale, and the profits to be made by advertising. [*438]

To which Lord KENYON assented.

When the plaintiff declares as editor of a newspaper, and another person proves that he was the editor, and so called, though the plaintiff was proprietor, and in fact revised the paper before its publication, it is a fatal variance.

The declaration averred, that the plaintiff was the proprietor, editor, and publisher of the newspaper called the *True Briton*.

The plaintiff proved that he was proprietor and publisher of the paper, and then called a witness to prove that he was the editor.

His evidence was that *he*, in fact, was and was called the editor of the paper, that is the compiler and manager; but that the plaintiff attended at the office and revised the paper, frequently omitted or admitted paragraphs intended for publication; and in fact exercised an entire controul over the paper.

Mingay objected; that the plaintiff having in his declaration averred that he was the editor of the newspaper in question; and the witness having proved that in fact *he* was the editor, the plaintiff should be nonsuited.

For the plaintiff it was answered, that the witness, though he called himself by that name, being under the controul and direction of the plaintiff, who was proved to be the proprietor of the paper, and by whom he was paid, that he should be deemed the editor, not the witness, who in fact was only acting in one department of the paper; and that on the principle of *qui facit per alium facit per se*, the plaintiff only could be deemed the editor. [439]

Lord KENYON said, that though the action was maintainable, and though the plaintiff need not have put that averment on the record, "that he was the editor," yet, having done so, he must prove it: that it appeared that there were distinct departments, one of which was that of editor; which department the witness had proved was filled by himself; that as to the relation between the witness and the plaintiff, he must take the meaning of the term *editor* according to the acceptation used by themselves; according to which acceptation the plaintiff was not editor, and therefore must be nonsuited.

Erskine, *Garrow*, and *Wood* for the plaintiff.

Mingay and *Lowndes* for the defendant.

In the next term *Wood* moved for a new trial, and to set aside the nonsuit; first, on the ground of misdirection, inasmuch as the plaintiff must be deemed the editor, the witness being only his servant, and on the same grounds urged above

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above for the plaintiff. But upon this ground the Court were unanimous with the Lord Chief Justice. The second ground was, that distinct injuries being committed against the plaintiff, in his distinct rights of proprietor and publisher, he should have been allowed to have recovered for these. Lord KENYON, ASHHURST, and GROSE, Justices, were of opinion, that plaintiffs should not put unnecessary averments on records; and if they did, that they should be bound to prove them. But Mr. Justice LAWRENCE intimating some doubt, a rule was granted; but afterwards a *stet processus* was entered by consent.

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SITTINGS AFTER TERM AT GUILDHALL.

Monday, Feb. 15th.

VAUGHAN v. MARTIN.

To prove an act of bankruptcy committed some years back, an old witness shall be allowed to recur to his deposition made at the time, to refresh his memory, and thereby ascertain the date of such act of bankruptcy.

THIS was an action brought by the plaintiff, as surviving assignee of *Sellers* and *Bacon*, who were bankrupts, to recover the sum of 113*l.*, being the amount of two dividends paid by that estate on account of *Martin* the defendant.

The case in evidence was, that before the bankruptcy of *Sellers* and *Bacon*, considerable paper accommodation had taken place between them and the defendant. At length, about the 20th of *September* 1787, they came to a settlement, and agreed to destroy all paper then in hand, and that each should pay their own acceptances. Two of these bills, for which *Martin* the defendant had so made himself liable, were not paid by him; the holder proved them under the estate of *Sellers* and *Bacon*, and received two dividends, amounting to the sum claimed of 113*l.*; to recover which the present action was brought.

The commission was sued out in the year 1789; and to prove the act of bankruptcy, a very old witness was called, who had proved

[441]

it before the commissioners on the opening of the commission in that year. The date of the act of bankruptcy being material, the witness could not precisely recollect it.

Mingay, for the plaintiff, proposed to read to the witness his deposition made at that time, in order to refresh his memory.

Erskine objected.

Lord KENYON said, that he would take the deposition to be in the nature of a memorandum made at the time, which would be evidence to which the witness might recur to refresh his memory; and that he therefore would allow the deposition to be read to the witness, and him to be asked if the matters there stated were true. They contained an account of the bankrupt's absconding to avoid his creditors, and the time when; which his

5 Lordship

Lordship ruled to be sufficient, on the witnesses affirming that the facts were as there stated.

1796.

VAUGHAN v. MARTIN.

The plaintiff recovered.

Mingay and *Russel* for the plaintiff.

Erskine for the defendant.

Thursday, Feb. 25th.

HODGES v. HODGES.

Where a wife is, by the ill-treatment of the husband, forced to leave his house, she shall carry with her credit for necessaries and the husband be liable.

THIS was an action of *assumpsit*, brought by the plaintiff, who was son to the defendant, to recover a sum of money for the board and maintenance of his mother, the defendant's wife.

The plaintiff's case was, that the wife had been compelled to leave her husband the defendant's house, in consequence of gross ill-treatment and cruelty.

Evidence was given to this effect; but it appeared that she had voluntarily left the defendant's house, though it proceeded from apprehensions of his ill-treatment and barbarity.

It was contended, for the defendant, that though, in case the husband turns the wife out of doors, he sends with her credit for necessaries, the rule of law did not apply where she voluntarily quitted it. [442]

Lord KENYON said, that where a wife's situation in her husband's house was rendered unsafe from his cruelty or ill-treatment, he should rule it to be equivalent to a turning her out of the house; and that the husband should be liable for necessaries furnished to her under those circumstances.

The parties compromised this action in Court.

Erskine and *Lawes* for the plaintiff.

Mingay and *Lambe* for the defendant.

Same day.

[*443]

WOOD v. WAIN.

In an action on the case, for giving a false character, it is not sufficient to charge the defendant with knowledge that the party recommended was in bad circumstances, that he (the defendant) had himself arrested him; and the defendant may go into evidence to explain the circumstances.

THIS was a special action on the case, to recover damages from the defendant, for having given a character of one *Harris*, that he was a good and solvent man, and might be trusted; in *consequence of which the plaintiff did give him a considerable quantity of goods on credit, the defendant at the same time knowing that he was insolvent and in bad circumstances; by reason of which (*Harris* having absconded) the plaintiff lost the price of the goods.

 It

1796. Wood v. Wain.

It was proved that on the 15th of *October* 1795, *Harris* came to the plaintiff's shop to buy goods, and referred the plaintiff to the defendant. On application to him, the defendant informed the plaintiff that *Harris* had done much business with him, and was then doing business with him, and was a good man.

Harris afterwards absconded.

The plaintiff further gave in evidence, that on the 4th of *September* preceding, the defendant had himself arrested *Harris* for a debt then due to him and his partner, and relied on this as sufficient evidence of knowledge of *Harris*'s circumstances being then embarrassed, and that of course a character of solvency afterwards given, was knowingly a false one.

For the defendant, it was relied, that though the fact was true, he was at liberty to explain it: which he did by stating, that having heard by accident that *Harris* had been seen in company with some persons who had been taken up as swindlers, he and his partner had, without any inquiry or deliberation, immediately arrested him; but that the circumstance was afterwards explained by a Mr. *Parrels*, who had offered to become security; and that the whole of the debt then due to them was discharged by *Harris* himself, and they still continued to deal with him on credit; and that in fact *Harris* had absconded in their debt.

[444] It was contended, that all this transaction should have been disclosed to the plaintiff, from whence he might have drawn his own conclusions.

Lord Kenyon, in summing up, told the jury, that as to this part of the case, he was of opinion, that nothing was imputable to the defendant; that though the fact of the arrest was a suspicious one, yet where a party arrests his debtor, who is a trader, under a misconception, from a suspicion which is afterwards done away, he might safely withhold the account of that fact. His Lordship afterwards added, that perhaps he was bound to withhold it, as the imputation might be injurious to his credit.

Some other circumstances having appeared in evidence, which brought the fact of knowledge of *Harris*'s circumstances being embarrassed at the time of the character given of his solvency, more home to the plaintiff, the jury found a verdict for the plaintiff.

Gibbs and *Marryatt* for the plaintiff.

Erskine and *Garrow* for the defendant.

Vide *Cowan* v. *Simpson*, ante 290. *Paisley* v. *Freeman*, 3 *Term Rep.* 51. *Scott* v. *Lara*, *Peake's Cases*, *N. P.* 226.

Rohl

1796.

Rohl *v.* Parr.

Saturday, Feb. 27th.

Where a ship's bottom has, during the voyage insured, been taken by the worm, in consequence of which she is incapable of proceeding on her voyage, and is condemned, this is not a loss by perils of the sea, within the meaning of the policy.

CASE on a policy of insurance on the ship *Zumber*, from *St. Bartholomew* to the river *Gombroon*, on the coast of *Africa*, and from thence to the *West Indies*, during her stay. There was a memorandum, "to be free from average, under ten *per cent.* for loss in boats, and from five *per cent.* for loss from insurrection."

The ship sailed from *St. Bartholomew* on the 1st of *September* 1792, arrived safe on the coast of *Africa*, and began to trade. In the month of *September* following, there was an insurrection of the slaves on board the ship. They had then forty-nine on board, and seven were killed, and one died by accident, in consequence of a fall.

After this, being about to return, it was found that the worm had taken her bottom, and had destroyed it so effectually, that the ship could barely get to *Cape Coast*, where she was condemned as irreparable.

Upon these facts, two points arose in the case; *1st*, Whether this was a total loss arising from the perils of the sea; or, *2dly*, A partial loss above five *per cent.* for which the plaintiff was entitled to recover.

Gibbs, for the plaintiff, contended, that the destruction of the ship's bottom from worms, having arisen in the course of her voyage, was a peril of the sea. If the ship had struck against a rock under water, and her bottom been destroyed, that would have been clearly within the policy; there it proceeded from an inanimate substance striking against the ship's bottom. The present case was that of an animated substance moving to destroy it.

Erskine, contra, insisted that it could not come under that description of loss, as not arising from any peril of the sea.

Lord Kenyon said, that it appeared to him a question of fact, rather than of law, such as the jury were competent to decide on, from the opinion on the subject adopted by the underwriters and merchants. [446]

The jury (which was a special one) found, that this was not a loss within the term of perils of the sea in policies of insurance, and of course that the plaintiff could not recover for a total loss.

In the case of an insurance upon slaves, free from an average loss under five *per cent.* for loss from insurrection, and a loss takes place from insurrection, the loss must be calculated in its proportion to the cargo, when it happened, and not when the whole cargo was sold.

It then became a question, as to the partial loss from the insurrection, which it was necessary should exceed five *per cent.* in order

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to give the plaintiff a title to recover. If the calculation was taken at the time when the loss happened by the insurrection, when the slaves were killed, then above five *per cent.* was the loss; but if at the time of the condemnation of the ship at *Cape Coast*, at which time the whole cargo was sold, it would be under five *per cent.*

Upon this point also, the opinion of the jury was taken. Mr. *Vaux*, an eminent underwriter, having been examined as to both points, they found, that the time at which the calculation was to be made, was at the time when the loss happened, at which time the proportion of the loss to the cargo then on board, was to regulate the loss.

Lord KENYON expressed his assent to the finding of the jury on both points.

The plaintiff had a verdict for an average loss.

Gibbs, *Smith*, and *Park* for the plaintiff.

Erskine and *Garrow* for the defendant.

[447]

Same day.

FYDELL v. CLARK et alt.

If a party discounts bills with a banker, and receives, in part of the discount, other bills, but not indorsed by the banker, which bills turn out to be bad, the banker is not liable.

ASSUMPSIT for money had and received. Plea of the general issue.

The defendants were trustees of the insolvent estate of *Hurlock*, *Anderton*, and *Jones*, bankers at *Bath*, and the action was brought to recover from them a sum of 4300*l.*, as paid to these bankers under a mistake, and under the following circumstances:

Thomas Fydell, the plaintiff, had been partner with his brother *Richard Fydell*, but the partnership had been long dissolved; when *Richard Fydell*, upon his own account, but in the partnership name, drew certain promissory notes to the amount of 8000*l.*, which he discounted with the bankers. He died in *March* 1794. After his death, the plaintiff, though not bound by law to do so, paid the 8000*l.*, the amount of the notes.

At the time when the plaintiff paid the 8000*l.*, he supposed that his brother had received the whole amount of the notes in money from the bankers; whereas, in fact, it appeared that they had only given him other notes and bills in lieu of them, but which they had not indorsed, and of which bills 4300*l.* turned out bad; and the present action was brought to recover that sum, as paid under a mistake.

[448] On the case being opened, Lord KENYON asked if the defendants, the trustees, had made a final dividend of the insolvent

estate;

estate; as in that case, he said, he would not allow the dividends to be disturbed, or the trustees to be charged out of their own estate. 1796.

FYDELL v. CLARK et alt.

It was answered, that sufficient had been reserved to answer the event of the present action. Upon which the cause proceeded.

The plaintiff proved, by one of the bankers whom they called, the fact of *Richard Fydell's* having discounted the notes with them, and the delivery of the bills and notes in question; but it appeared that they were delivered to *Richard Fydell*, without any indorsement by the bank.

Being asked why they were not indorsed? the witness said, it was not their practice to indorse bills so given; and no other reason was given why they were not indorsed.

Lord KENYON now said, that he must take the case as if *Richard Fydell* was the plaintiff. If, in the discount of the notes, he took the bills and notes in question, he must be bound by it: the bankers parted with them, supposing them to be good: and he took them under the same impression. Having taken them without indorsement, he hath taken the risque on himself. They were the holders of the bills, and by not indorsing them, have refused to pledge their credit to their validity; and *Richard Fydell* must be taken to have received them on their own credit only. His Lordship concluded with observing, therefore, that the action could not be supported.

The counsel for the defendant then contended, that the present case was not distinguishable from that of *Fenn* v. *Harrison*, 3 *Term Rep.* 757, on which an action for money had and received [449] was adjudged to lie against the defendant; though there the bill had been indorsed without any authority from him when it was discounted.

Lord KENYON said, that the case of *Fenn* v. *Harrison* did not apply: there the party had been held liable, on the footing of the indorsement having been made by a clerk, who was his agent: but here there was no indorsement at all.

The plaintiff was nonsuited.

Erskine, *Marryatt*, and *Abbot* for the plaintiff.

Gibbs and *Praed* for the defendant.

Vide 4 *Term Rep.* 177.

1796.

BULMAN v. BIRKETT.

Same day.
In an action against an attorney, to which he gives notice of set-off of his bill for business done for the plaintiff, he must deliver a bill signed, but it need not be delivered a month under the statute.

ASSUMPSIT for goods sold and delivered.

Plea of the general issue, and a set-off.

The action was brought to recover the amount of a tailor's bill. The set-off was for business done for the plaintiff, as an attorney.

It became a question, whether the party was bound to deliver a bill, under stat. 2 *Geo.* II. in the same manner as if he had been plaintiff in the action.

Per Lord KENYON. The rule is, that when an attorney means to avail himself of his bill for business done, and to give it in evidence, he must deliver in a bill signed to the plaintiff; but it is not necessary that a month's time should intervene between the delivery and the action.

[450] The cause was referred.

Mingay and *Espinasse* for the plaintiff.

Garrow for the defendant.

STURDY v. ROSS.

Tuesday, March 1st.
If an officer on foreign service, sends in his resignation to the agent of the regiment for the sale of his commission, the agent must take care to secure to him the purchase money.

CASE for money had and received.

Plea of the general issue.

The action was brought by the plaintiff, who had been an ensign in the 54th regiment of foot, to recover from the defendant, who was agent to the regiment, the sum of 400*l.* and interest, being the amount of the sale of his commission on quitting the regiment.

For the plaintiff, it was proved, that being absent in *America*, doing duty with the regiment, he had transmitted to the defendant, as agent of the regiment, his resignation.

It was proved on the other side, that this resignation is delivered to the colonel of the regiment, who accepts it, and sends in with it to the war-office a recommendation of the successor; but it was in evidence, that no commission is made out for the successor, without a certificate that the money is lodged for the purpose of the purchase.

The money had in fact been paid to one *Cuthbert*, who had
[451] been in the service of the defendant, and who, the plaintiff contended, was so at the time of the money paid; but the defendant relied, that after the resignation was handed over by him to the colonel, his responsibility was at an end; and in the present instance *Cuthbert* having been the private agent of the colonel, it was further relied, that the money had been paid to him in that capacity; so that if any person was liable, it was the colonel.

Cuthbert had died insolvent.

An army agent also gave in evidence, that when he sold a commission, he secured the purchase-money, unless where the parties settled it among themselves; and that he had never received the resignation of any commission which another person had sold.

Lord KENYON ruled, that where the officer was absent on foreign service, it was the duty of the agent, when the resignation was sent in to him, to take care that the purchase-money was properly secured to him, as otherwise the situation of officers abroad would be subjected to much risque and inconvenience; that in the present instance, the defendant must be considered as adopting the acts of *Cuthbert*, and be therefore liable for money received by him in that capacity.

The jury found a verdict for the plaintiff, for the whole sum and interest.

Mingay and —— for the plaintiff.
Erskine, *Gibbs*, and *Park* for the defendant.

COLSON et alt. *v.* SELBY.

Dec. 21st.

In an action against one partner, if the plaintiff gives in a particular of his demand, and the defendant pleads partnership in abatement, if the defendant proves any of the items to have been furnished on the partnership account, he shall be entitled to a verdict.

ASSUMPSIT for goods sold and delivered, work and labour with the common counts.

Plea in abatement, that the several promises and undertakings, and each of them, were made by the defendant and one *Francis Towns* jointly, and not by the defendant only.

Replication, that they were sole and not jointly made; upon which issue was joined.

The action was brought by the plaintiffs, as assignees of *Hunter* a bankrupt, to recover a sum of money due to the bankrupt for freight, some pipes of wine, and other lesser articles; and the question was, Whether they had been furnished on the credit of the defendant only, or on account of the partnership of *Selby* and *Towns*?

In the course of the cause, the plaintiff's attorney had been called upon for a particular of the plaintiff's demand. They had given in this particular, amounting to 1699*l.* 13*s.* 6*d.*, but in which there was a sum of 1557*l.* 1*s.* 5*d.* clearly furnished to the partnership of *Selby* and *Towns*, and so admitted to be at the trial.

Garrow, for the defendant, insisted, that the defendant was to regulate his defence by the plaintiff's demand; if any part

was

1796.

Colson et alt. v. Selby.

[*453

was on a partnership account, to that the defence must be, that it was so furnished, and not on account of the defendant *Selby*; that he *was therefore justified by the particular, in the plea he had pleaded, and entitled to a nonsuit, the plaintiff having failed in establishing that part of his demand.

Erskine, for the plaintiff, contended, that where a particular was given in under a Judge's order, the party was not bound to prove every item of it; it would therefore be sufficient for him to establish any of the items to be furnished on the credit of *Selby*, the defendant, alone.

Lord Kenyon ruled, that the plaintiffs were bound by the particular they had given in; and one of the articles being clearly on the partnership account, the defendant was well warranted in the plea he had pleaded; and so directed the plaintiff to be nonsuited.

Erskine and *Anderson* for the plaintiff.

Garrow and *Gibbs* for the defendant.

In the next term the plaintiff applied for a rule to shew cause why the nonsuit should not be set aside, and a new trial granted; but the Court concurred with the Lord Chief Justice, and refused the rule.

END OF HILARY TERM IN THE KING'S BENCH.

[454]

IN THE COMMON PLEAS.

SITTINGS AFTER HILARY TERM.

Saturday, Feb. 26th.

Winbled *v.* Malmberg.

The articles of a foreign ship, made abroad, regulating the wages of the sailors, &c. even where the sailor has been hired in *London*, and which articles are lodged with the consul in *London*, may be given in evidence of the agreement for the hiring and wages to the sailor, without being stamped.

CASE for seamen's wages.

Plea of *non-assumpsit*.

The action was brought by the plaintiff, who was a *Swedish* sailor, against the defendant, the captain, to recover wages claimed by him, at the rate of 35*s*. per month.

The plaintiff and defendant were *Swedes*, and the vessel a *Swedish* vessel.

The defence relied upon was, an agreement for the wages at four dollars only *per* month, made before the ship sailed; which agreement

agreement was lodged with the *Swedish* consul, whom the defendant called as a witness.

1796.

WINBLED v. MALMBERG.

He produced a paper, made originally in *Sweden*: it contained the ship's articles, with the names of the seamen on board, and the wages they were to receive. It also contained an account of any change that took place in the crew, such as, if any of them had deserted—those who had been hired in their stead, in the course of the voyage. Among others the plaintiff had been hired in *London*, on the first of *June* 1795; his name was there found entered; and the entry of the wages he was to receive, [455] was four dollars *per* month.

By the regulations of the Court of *Sweden*, this paper is lodged in the consul's hands in *London*.

Bond, Serjeant, for the plaintiff, contended, that this paper should not be given in evidence, as it was offered in proof of an argument for an hiring at a certain rate, and was not stamped.

EYRE, Chief Justice, over-ruled the objection. His Lordship said, it was not an agreement between the parties, but a regulation made by the Court of *Sweden* for public purposes, and evidenced by their consul. He therefore admitted it; and the defendant had a verdict.

Bond, Serjeant, and *Henderson* for the plaintiff.

Le Blanc for the defendant.

GOTLIEB *v.* DANVERS.

Monday, Feb. 28th.

Where a notice has been given to a party to produce an instrument, of which, at the same time another copy was made, it may be given in evidence without notice to produce that in the other party's possession.

THIS was an action on the case, for work and labour, in erecting a crane on the defendant's premises, who was a warehouseman, of a particular and unusual construction; and the action was brought to recover the price, &c.

The defence relied upon by the defendant was, that the crane had not answered the purposes represented by the plaintiff that it would; that the defendant had therefore given notice to the plaintiff to that effect, and required him to take it down within a month, or he should get others to do it; and he from thence relied that he was not bound to pay for it.

The defendant called a witness, who produced a written notice to that effect, which had been served on the plaintiff; but no notice had been given to the plaintiff to produce that served upon him.

Cockell,

1796.

GOTLIEB v. DANVERS.

Cockell, Serjeant, objected to this being admitted, as offering the evidence of a copy, where there had been no notice to produce the original.

EYRE, Chief Justice, said that this was not a copy; that where two copies are made of any instrument or notice at the same time, both were to be deemed originals, and in such case, the one remaining in the defendant's hands was itself an original, and might be given in evidence, without notice to produce the other.

The plaintiff had a verdict.

Cockell, Serjeant, and *Gurney* for the plaintiff.

Le Blanc, Serjeant, and *Wigley* for the defendant.

CURRY v. WALTER.

A barrister cannot be called as a witness, to prove what was stated by him on a motion before the Court.

THIS was an action on the case, for a libel.

The libel for which the action was brought, was an account published in the newspaper called the *Times*, of which the defendant was the proprietor, of an application made to the Court of King's Bench, by Mr. *Erskine*, for an information against the defendant, for misconduct as a magistrate.

Mr. *Erskine* was subpœnaed to prove that such a motion had [457] been made, and that he had in fact stated, on that application, what the newspaper had reported him to have said.

Upon Mr. *Erskine*'s coming into Court, EYRE, Chief Justice, said he was of opinion a barrister should not be called as a witness to prove such a circumstance, but that the party should prove it by other means, or by other witnesses who were present at the time of the motion; but that it should be at the option of the counsel, whether he would give his testimony or not.

Mr. *Erskine* said, he would not volunteer the giving of evidence on such an occasion, and retired.

An objection being taken whether the action was maintainable,

A report in a newspaper of what passed in Court, is not a libel.

EYRE, Chief Justice, held, that *bonâ fide* report of what passed in a court of justice, was not actionable, but that he would hold the defendant to very strict proof, that the report, as published, contained precisely the substance of that delivered in Court, as otherwise the pretended report might be made the vehicle of slander.

The defendant did give that evidence, and had a verdict.

END OF HILARY TERM.

CASES

ARGUED AND RULED

AT NISI PRIUS,

ON THE

OXFORD CIRCUIT,

SUMMER ASSIZES, 1795*.

WORCESTER, CORAM THOMSON, BARON.

WALKER v. BROADSTOCK.

Where a party claims common *pur cause de vicinage*, as appurtenant to a messuage, declaration of a former tenant of the same messuage, as to such right, is admissible, even though such tenant be living.

THIS was a feigned issue, to try a prescriptive right of common claimed by the plaintiff, on *Corse Lawn*, in the parish of *Corse*, in the county of *Worcester*, as appurtenant to a messuage situate in the parish of *Stanton*, in the county of *Gloucester*; which parishes are also in different manors.

The claim was *pur cause de vicinage*; and the plaintiff made a strong case of constant and uninterrupted usage.

The defendants proved that one *Clark*, who had been occupier of the plaintiff's messuage forty years ago, but who was now dead, had in his lifetime acknowledged, that his cattle had been impounded on *Corse Lawn*; and it was allowed to be evidence of the fact. (Vide *Davis* v. *Pierce* et alt. 2 *Term Rep.* 53.) They also offered evidence that one *Walker* (not the plaintiff)

* I am indebted for the following cases, from the *Oxford* Circuit, to the obliging communication of Mr. *Jervis*. At the conclusion of this volume, I cannot at the same time omit the opportunity of making a similar acknowledgment to Mr. *Barrow*, to whose accuracy in taking notes, and attention to any point ruled in my absence, I am under many obligations.

who

1795. — WALKER v. BROADSTOCK. [*459]

who had been occupier of the plaintiff's messuage, who was now *living, and had no interest in the cause, had, during the time of his enjoyment of the plaintiff's messuage, declared his opinion that he had no such right of common appurtenant to the messuage. And on its being objected that this *Walker* himself should have been produced, and that this was but hearsay evidence, it was answered that it was not evidence of the fact, but of the opinion of the tenant, and that of such opinion it was the best evidence; and that the declarations of occupiers are evidence against their own rights.

[460] Upon these grounds the learned Judge admitted the evidence, and the plaintiff had a verdict.

Miles, *Bragge*, and *Wigley* for the plaintiff.

Plumer, *Dauncey*, and *Dowdeswell* for the defendant.

AT STAFFORD, SAME ASSIZES, CORAM LORD KENYON.

DOE ex. dem. COLCLOUGH v. MULLINER.

Encroachments by the tenant on the waste, do not belong to the landlord.

EJECTMENT by landlord, after the expiration of a lease, against his tenant, for the recovery of a garden, which the tenant had gained during his tenancy by encroachment.

Lord KENYON revolted at the idea that the tenant could make the landlord a trespasser; which, he said, would unavoidably be the case, if the landlord could recover in this ejectment. His Lordship laid it down as clear law, that if a tenant inclose part of a waste, and is in possession thereof so long as to acquire a possessory right to it, such inclosure does not belong to the landlord; but if the tenant has acknowledged that he held such inclosed part of his landlord, this would make a difference; and he refused to save the point.

Leycester for the plaintiff.

Plumer for the defendant.

AT

1795.

AT SHREWSBURY, SAME ASSIZES, CORAM THOMSON, BARON.

DOE ex dem. CHALLNOR v. DAVIES.

EJECTMENT for two pieces of land, part of a common in the county of *Salop*, which had been inclosed by the defendant and another, who occupied a farm of the plaintiffs, contiguous to the common on which the encroachment had been made. Same point as last case.

The case stated on the part of the plaintiff was, that in the year 1721, a Mr. *Vaughan* let *Challnor's* farm to *Richard Davies*, for ninety-nine years, if three persons should so long live, the last of whom died twelve months ago. Soon after the making of the lease, the tenant then in possession took a patch of land belonging to the common immediately contiguous to the farm. It appeared that there was no communication between the farms and the inclosure, but the gate from the inclosure led from the waste. It also appeared, that about forty years ago the then tenant made another encroachment on the common, by inclosing another piece of land adjoining the first encroachment, but not communicating with the farm.

The ejectment was brought (the lease being now expired) for the recovery of these encroachments, which the tenant had not given up with the rest of the farm; and it was contended on the part of the lessor of the plaintiff, that the encroachments must [462] be taken to have been made for his benefit.

It was contended, on the part of the plaintiff, that it was clear law, that if the encroached land had been laid to the farm, then it must be taken to have been for the benefit of the landlord; which was acceded to by the defendant's counsel, under this limitation, if the landlord had shewed his assent to such trespass, as in the case of a lease from year to year.

The learned Judge intimated a strong opinion against the plaintiff in this case; but Mr. *Leycester* mentioning that it had been admitted in a case before *Perryn*, Baron, at *Hereford*, wherein Mr. *Bower* and Mr. *Plumer* had been counsel, that encroachments by tenants were for the benefit of their landlords; and that the same doctrine had been recognized by *Heath* and *Buller*,

1795. — DOE ex dem. CHALLNOR v. DAVIES.

Buller, Justices, upon this circuit; his Lordship, out of deference to such high authorities, declined to nonsuit the plaintiff, which he otherwise would have done; and the plaintiff obtained a verdict.

See the case of *Doe ex dem. Colclough* v. *Mulliner*, ante.

Plumer and *Leycester* for the plaintiff.

Miles and —— for the defendant.

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[463]

AT HEREFORD, SAME ASSIZES, CORAM LORD KENYON.

COOPER *v.* DAVIES.

CASE on a promissory note for 10*l.*, by indorsee against drawer.

Plea of the general issue.

Lawrence, the payee, was called; and, upon objection, admitted to be a good witness. He proved that 5*l.* had been paid before indorsement, but that the plaintiff had no notice of such payment; and as to the other 5*l.*, he said it was paid to a person authorized by the plaintiff to receive it.

Lord KENYON held, that the first payment being without notice, the plaintiff was entitled to recover 5*l.*; upon which a question arose, whether his Lordship was bound to certify, under the *Welsh* Judicature Act, 13 *Geo.* III.; which he seemed unwilling to do. However, his Lordship afterwards declared, that upon looking into the act, he found he had no discretion in the case, and accordingly certified.

Vide *Evans* v. *Jones*, 6 *Term Rep.* 500.

END OF VOL. I.

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REPORTS

OF

CASES

ARGUED AND RULED

AT

Nisi Prius,

IN THE

COURTS OF KING'S BENCH

AND

COMMON PLEAS,

From Easter Term 36 George III. 1796,
To Hilary Term 39 George III. 1799.

By ISAAC 'ESPINASSE,
OF GRAY'S INN, ESQ. BARRISTER AT LAW.

———Quando artibus unquam honestis
Nullus in urbe Locus, nulla Emolumenta laborum? *Juv. Sat.*

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NAMES

OF THE

CASES REPORTED

IN THE SECOND VOLUME,

Which begins at Page 465.

NAMES OF THE CASES REPORTED IN VOLUME II.

CASES

1796.

ARGUED AND RULED

AT

NISI PRIUS.

LENT ASSIZES

AT MAIDSTONE, 1796,

CORAM BARON HOTHAM.

GORDON *against* HARPUR, Esq. Sheriff of KENT.

March 19th.

Trover is not maintainable, unless the party is in the actual possession of the goods for which the action is brought, or has at least the right of immediate possession.

THIS was an action of trover against the defendant as sheriff of *Kent* for a quantity of household furniture taken in execution by him, under a writ of *testatum fieri facias* issued against —— *Borrett*, Esq. at the suit of *Bromhead.*

Borrett was the owner of a house at *Shoreham*, in *Kent*, and of a quantity of household furniture belonging to it. The house he had let, and sold the furniture for 300*l.* to *Gordon*, the plaintiff. On the 7th of *May*, 1794, *Gordon* the plaintiff let the house and furniture to one *Biscoe*, for the whole of the time for which he had himself taken it from **Borrett*, and from which time, until the taking of the goods by the sheriff, *Biscoe* had occupied the house, and used the furniture as it had been demised to him; and he was in possession when the sheriff entered, his term not being then expired. *[466]

The plaintiff proved the letting of the house by *Borrett* to *Gordon*, and the sale of the furniture, and produced *Borrett*'s receipt for the consideration, *viz.* 300*l*;. but which by an indorsement *Gordon* agreed to resell at the end of three years to *Borrett* for the same sum.

1796. — GORDON *against* HARPUR.

It had been agreed between the parties, to admit that *Biscoe* was tenant in possession under the demise from *Gordon*, at the time the sheriff entered, which demise was then unexpired; and that the sheriff had seized and sold under an execution, at the suit of a creditor of *Borrett*.

This was the plaintiff's case.

Upon this state of the facts, it was contended by the defendant's counsel at the trial, that the action could not be maintained, inasmuch as the plaintiff had let to *Biscoe* for the whole of his term, which was not yet expired; so that he was not in actual possession at the time of the seizure and sale, nor had he any right of possession until the expiration of *Biscoe*'s term: that possession, or at least a right of possession, was necessary to maintain an action of trover; and to re-establish that position, 5 *Bac. Abr.* 258, was cited as expressly laying down the point, and *Berry* v. *Heard*, *Cro. Car.* 242.

For the plaintiff it was contended,—that the plaintiff had the legal possession as well as the property, the demise to
[467] *Biscoe* being only of the use of the furniture; and the case of *Ward* v. *Macauley*, 4 *T. R.* 489, was relied on: in that case the plaintiff had let a ready-furnished house to Lord *Montfort*, and the lease contained a schedule of the furniture: the furniture being afterwards taken in execution by a creditor of Lord *Montfort*, the plaintiff brought trespass; when at the trial Lord *Kenyon* was stated to have been of opinion, that trespass would not lie, but trover should have been brought by the plaintiff; and that his Lordship, in delivering his opinion, took the distinction between trespass and trover, the former being founded in possession; the latter on property.

The Judge was of opinion that the action was not maintainable; but reserved the point.

Garrow, *Runnington*, Serjeant, and *Adam*, for the plaintiff.

Shepherd, Serjt. and *Best*, for the defendant.

In the *Michaelmas* Term following, (*a*) the case came on to be argued; when the Court were of opinion that the action was not maintainable; and ordered the *postea* to the defendant.

Vid. Lord *Cullen*'s case, *Bull. N. P.* 3.—*Flewellin* v. *Rave*, 1 *Bulst.* 68.

(*a*) 7 Term. Rep. 9. S. C.

CASES

1796.

ARGUED AND RULED

AT

NISI PRIUS

IN THE

KING'S BENCH

IN

EASTER TERM, 36 GEORGE III.

FIRST SITTINGS IN TERM.

LEVECK and POLLARD *against* SHAFTOE.

Wednesday, April 18th.

Where a partner has withdrawn his name from the firm, though he may continue to receive part of the profits as a dormant partner, it is not a ground of nonsuit that his name is not joined in the action.

ASSUMPSIT for work and labour—with the usual money counts.

The action was brought by the plaintiffs, who were tailors, to recover the amount of their bill for clothes furnished to the defendant's family.

The plaintiffs proved the work done and the clothes delivered. The first *item* in the bill was in the year 1791.

Mingay, for the defendant, asked the witness what partners constituted the firm under which the business was carried on in that year?

*The witness answered, *Leveck* and *Pollard*, the present plaintiffs.

*[469]

He

1766.

LEVECK *against* SHAFTOE.

He then asked if there was not another partner of the name of *Conste* who received part of the profits?

The witness said that Mr. *Conste* had formerly been in partnership with the plaintiffs, but that he had retired in the year 1786, when the present partnership was formed; but that he did not know whether in the year 1791 he might not receive something out of the profits of the trade.

Mingay contended for a nonsuit, on the ground that *Conste* must be taken to be a partner at the time of the action brought, and so ought to have joined in the action.

(*a*) Lord KENYON overruled the objection; and held, that if a person had been a partner, and his name in the firm, [470] and he afterwards withdrew his name, but continued to receive part of the profits; though such person still continued liable

(*a*) At the Sittings after *Mich.* 1789, a case under similar circumstances had been so ruled by Lord *Kenyon*.

STACEY ROSS et al. *against* DECY.

It was an action for goods sold and delivered: plea of set-off.

It appeared in evidence, that the plaintiffs had entered into a partnership as grocers; and it was agreed that *Ross* should keep the shop in his own name only. Under those circumstances he dealt with the defendant for the partnership goods, for which this action was brought.

The defendant had done business for the plaintiff *Ross* on his own account, and not on account of the partnership, to a greater amount than the demand now made against him by the partnership; and this he offered to set off.

It was opposed on the ground of the demands accruing in different capacities, and that so it was inadmissible.

Lord KENYON was of opinion that the set-off was good; his Lordship said the plaintiffs had subjected themselves to it, by holding out false colours to the world, by permitting *Ross* to appear as the sole owner: that it was possible the defendant would not have trusted *Ross* only, if he had not considered the debt due to himself as a security against the counter-demand.

Erskine observed, that the defendant had thereby a double advantage: for if he dealt with *Ross* as the only partner, and had had a demand against the partnership account, he might have maintained an action against them all; yet here he was permitted to consider *Ross* as the only partner.

Lord KENYON admitted this consequence to follow from the fallacy held out to the world by such as stand in the situation of sleeping partners, but allowed the set-off to the extent claimed; and the defendant had a verdict.

as

as to all demands against the partnership, on the ground of the profit he derived; he would not allow persons who had dealt with the firm, without his name appearing in it, to avail themselves of the objection of such partner's not having joined in the action, for the purpose of a nonsuit, but would suffer the firm with which the defendant had dealt to maintain the action in their own names only.

1796.

LEVECK *against* SHAFTOE.

The plaintiffs recovered the amount of the bill.

Garrow and *Conste* for the plaintiffs.

Mingay for the defendant.

LAST SITTINGS IN TERM.

[471]

CRANTZ *against* GILL.

May 23d.

Where a father gives his son a reasonable allowance for his expenses, the son is solely liable; neither shall the father be liable even for necessaries.

ASSUMPSIT for the goods sold and delivered. Plea of the general issue.

The action was brought to recover a sum of money for clothes furnished by the plaintiff, who was a tailor, to the defendant's son, an infant.

The plaintiff proved the clothes were furnished to the young man, and that the prices were reasonable.

The case in evidence on the defence was, that the father (the defendant) resided in *Cumberland*, and had sent his son up to *London*, to be employed in the business of a haberdasher. That he had sent him to the care of a Mr. *Atkinson*, with instructions to him to pay a proper sum for providing the young man with necessaries suitable to his situation.

Mr. *Atkinson* was called; and he proved the above circumstances, and that he had in fact paid the son an allowance while he was in *London*, by his father's directions; that he had ordered clothes for him, but never pledged the father's credit in any respect. [472]

Per Lord KENYON. The goods being furnished to the son, he

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CRANTZ *against* GILL.

he is himself *primâ facie* liable, they being necessaries;—if tradesmen deal with him, and he undertakes to pay them, they must resort to him for payment: the father, it is true, may be liable for necessaries furnished to his son on his credit; but when he gives his son an allowance, that is in lieu of all charges, the father cannot be bound by law to pay even for necessaries furnished to the son under those circumstances. It would be a great hardship on the father, who would so be obliged twice to pay for necessaries furnished to his son.

The defendant had a verdict.

Erskine and *Chambre* for the plaintiff.

Law for the defendant.*

Vid. *Ford* v. *Fothergill*, *ante*, 211. *Peake N. P. Cas.* 229. S.C.

(*a*) PROBART *v.* KNOUTH, 15th *Dec.* 1783. Sittings at Guildhall after *Michaelmas Term.*

THIS was an action on the case for money lent.

Plea of infancy.

The defendant proved that he was under age at the time of the money being lent.

The plaintiff's counsel offered to prove, that the money had been laid out in the purchase of necessaries.

But Mr. Justice *Buller*, before whom the cause was tried, refused to admit the evidence, saying, that the difference was between supplying an infant with necessaries, and lending him money to supply himself with them; which in the last case could not be done, as the plaintiff thereby put it in the defendant's power to misapply the money.

Verdict for the defendant.

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[473]

May 25*th.*

MARNELL, GENT. *against* PICKMORE.

Where a party becomes the guardian on record of an infant, he is liable to the payment of the attorney's bill, though he did not interfere in the conduct of the action, nor was in any way interested in the event.—*Aliter*, if he becomes so on condition of his name only being used, or was induced to become so from misrepresentation or deceit.

CASE for business done as an attorney.

Plea of the general issue.

In the last year, a lady of the name of *Murray* being about to sue a Mr. *Gale* on the breach of promise of marriage, employed Mr. *Marnell*, the plaintiff, as the attorney to conduct it. She being an infant, it was necessary that she should appear by a guardian on the record. The present defendant was uncle

to

to Miss *Murray*, and he on application consented to become so.

The case of *Murray* and *Gale* was tried, and a verdict went for the defendant; Miss *Murray* not having paid the costs, the present action was brought by the plaintiff as her attorney to recover his costs in prosecuting the cause on her account.

Gibbs for the defendant made two points; 1st, Whether a party, by admitting his name to be used as guardian to an infant on the record, did thereby subject himself to the costs of the attorney employed on the part of the plaintiff, he having merely [474] lent his name, not having interfered with the cause, and not being beneficially interested in the event. 2dly, That at the utmost it could only subject him *primâ facie*; and it would be open for him to go into evidence of the circumstances under which he had become so: and to this purpose he proposed to prove that the defendant had been induced to lend his name under a misconception, and a promise that he should not be charged.

Lord KENYON said the law was, that if a person in an unqualified manner became the guardian to an infant in any cause, and suffered his name to appear on the record in that character, he thereby *primâ facie* made himself liable as well to the plaintiff's attorney as to the defendant: that if, however, he was induced by any delusion or misrepresentation to place himself in that situation, he was not liable; but it was a question of fact to be left to the jury, to decide under what circumstances he had become so, whether voluntarily or in consequence of deceit.

No evidence was offered of any misrepresentation or inducement held out to the defendant; and the jury found a verdict for the plaintiff.

Erskine and *Wood* for the plaintiff.

Gibbs and *Yates* for the defendant.

1796.

May 26th.

Turner *against* Railton.

The plaintiff may call the former attorney for the defendant, to prove an offer by him on the part of his client to settle the account, and to pay a sum of money as due to the plaintiff.

ASSUMPSIT for money lent, goods sold and delivered, &c. Plea of *non-assumpsit.*

*To prove the amount of the plaintiff's demand, the plaintiff proposed to call the defendant's former attorney, to prove his having applied to settle the account, his admission of the debt, and an offer on the part of the defendant his client, to pay a certain sum on account of the plaintiff's demands.

*[475]

Gibbs objected: that this was disclosing the secrets of his client, who must have communicated to him the circumstances of the case in consulting him when sued by the plaintiff; and besides, that the offer being made with a view to compromise the debt, was not admissible.

Per Lord Kenyon. Concessions made for the purpose of settling the business for which the action is brought, cannot be given in evidence; but facts admitted I have always received.

His Lordship admitted the evidence, and the plaintiff had a verdict on that testimony.

Garrow and *Holroyd* for the plaintiff.

Gibbs for the defendant.

*[476]

May 26th.

Beckford *against* Montague, Esq. Sheriff of Wilts.

If a defendant against whom a ca. sa. issue, is visible, and in the usual course of his business, and the sheriff neglects to arrest him, or returns *non est inventus*, an action lies for the negligence or for the false return.

THIS was an action against the sheriff of *Wiltshire* for a false return.

The case in evidence was, that the plaintiff had sued out a writ *against a person of the name of *Hunt*, and a warrant had been made out thereon and delivered to one of the defendant's bailiffs.

The ground of the action was, that the bailiff had given notice to *Hunt* of the writ being out against him; in consequence of which *Hunt* had kept out of the way when he pretended

tended to go to arrest him; so that no arrest was made, and *non est inventus* was returned on the writ. 1796.

BECKFORD *against* MONTAGUE.

To prove this case, the plaintiff first produced the writ, which was a *latitat* of 2d of *July*, 1795, indorsed to hold the defendant to bail, and the return of *non est inventus*.

He then proved that *Hunt* was a shopkeeper at *Amesbury*: that he carried on his business at that time publicly, and was visible at all times: and he further proved, that *Hunt* had given half a guinea to the bailiff for the purpose of getting him some indulgence.

Lord KENYON, in summing up to the jury, told them that the fact to be tried was, Whether the defendant could be found in order to be arrested, the sheriff having returned *non est inventus?* which, if the defendant could have been arrested, was a false return. The sheriff was bound to execute the process of the law in the most effectual way: if a person against whom a party had a writ, did not abscond, but continued in the daily exercise of his usual occupation, appeared publicly as usual, was visible to every person that came to him about business, and the bailiff neglected to arrest him, and returned *non est inventus* to the writ, such was unquestionably a false return; for it was the duty of the bailiff to use every means to search for the defendant, and to make the arrest. His Lordship added, that in those cases, though the action was maintainable in case the jury [477] believed the witnesses for the plaintiff, they were not called upon to give the plaintiff the whole extent of the debt, if the defendant in the former action was then solvent.

The jury found a verdict for the plaintiff, and 10*l*. damages.

Mingay and *Watlington* for the plaintiff.

Burrough and *Durnford* for the defendant.

IN an action against the sheriff for a false return, the declaration should state that the plaintiff had a good cause of action against the defendant in the original action, by stating "that the defendant was indebted to him for money lent, goods sold," &c. where there was such an averment.

In the case of PARKER *v*. FENN and BLOXAM, Sheriffs of *London*.
Sittings before *Michaelmas* Term 1788,

It was ruled by Lord KENYON, that where the declaration for false return stated that the defendant was indebted to the plaintiff for goods sold and delivered, that the plaintiff was bound to prove the averment so made, as laid in the declaration; that is, that the cause of action *was for goods sold and delivered.*

END OF EASTER TERM, 36 GEO. III.

1796.

CASES

ARGUED AND RULED

AT

NISI PRIUS

IN THE

KING'S BENCH

IN

TRINITY TERM, 36 GEORGE III.

SITTINGS AFTER TERM AT WESTMINSTER.

*[479]

TURNER *against* DAVIES.

Where the defendant at the instance of the plaintiff became a joint security for a third person, and the plaintiff was forced to pay all the money, he cannot call on the defendant for contribution of a moiety. *Aliter*, if he had become a joint security of his own motion.

THIS was an action of *assumpsit* for money paid, laid out, and expended to the use of the defendant.

Plea of *non-assumpsit*.

The action was brought to recover from the defendant a moiety of the sum of 22*l*. paid by *Turner* the plaintiff, on account of the debt of one *Evans*, and arose under the following circumstances:

There being an execution in *Evans*'s house, at the suit of *Brough*; to induce *Brough* to withdraw it, and to secure the debt, *Turner* the plaintiff and **Davies* the defendant joined in a warrant of attorney to *Brough*; but *Davies* had joined in consequence of having been applied to by *Turner*, and *Brough*

who

1796.

TURNER *against* DAVIES.

who required an additional security. *Turner* the plaintiff took a bill of sale from *Evans* for his own security, dated 20th *January*, 1796; and an indorsement was made on it, declaring the purpose for which it was given.

Another execution having issued against *Evans*, the goods were taken in execution, and *Turner* the plaintiff had paid the whole of *Brough*'s demand, and now brought this action against the defendant for contribution of the moiety.

Lord KENYON. I have no doubt, that where two parties became joint sureties for a third person, if one is called upon and forced to pay the whole of the money, he has a right to call on his co-security for contribution: but where one has been induced so to become surety at the instance of the other, though he thereby renders himself liable to the person to whom the security is given, there is no pretence for saying that he shall be liable to be called upon by the person at whose request he entered into the security. This is the case here: *Davies* the defendant became security, at the instance of *Turner* the plaintiff, to *Brough*; and there is still less pretext for *Turner* to call on the defendant in this action, as he took the precaution to secure himself by a bill of sale. I am of opinion the defendant ought to have a verdict.

The jury found for the defendant.

Gibbs and *Marryatt* for the plaintiff.

Garrow and *Barrow* for the defendant.

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BERTHON *against* CARTWRIGHT.

June 18th,

If a wife by ill-treatment and fear of bodily injury is forced to quit her husband's house, any person may safely receive her, and not be subject to an action at the husband's suit.

CASE for seducing the plaintiff's wife, detaining her, and thereby depriving him of her society.

Plea of not guilty.

The plaintiff proved the elopement of his wife from his house, and her reception and entertainment by the defendant.

The defence was, that the plaintiff's wife had been compelled to leave his house in consequence of ill-treatment, and had been received by the defendant out of motives of humanity.

2 It

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BERTHON *against* CARTWRIGHT.

It was ruled by Lord KENYON, that if a husband ill-treats his wife so that she is forced to leave his house through fear of bodily injury, a person may safely, nay honourably, receive and protect her: and that of course in such case no action was maintainable.

The plaintiff was nonsuited.

Erskine for the defendant.

Vid. *Winsmore* v. *Greenbank*, *Bull. N. P.* 78.

Tuesday, June 21st.

DILK *against* KEIGHLEY.

Where an infant carries on trade, an action is not maintainable against him for work done for him in the course of that trade which he so carries on, on his own account, and whereby he gains his living.

CASE for work and labour.

Plea of infancy.

*Replication of necessaries.

The plaintiff was a writing painter, and the defendant a glazier and painter, and the work was done by the plaintiff in the way of his trade, in painting and gilding letters for the defendant's customers.

On the case being opened, Lord *Kenyon* expressed an opinion that the action was not maintainable, the plaintiff's counsel having admitted the infancy.

*[481]

It was contended by the defendant's counsel, that those things were to be deemed necessaries by which an infant gained his living: that in the present case the defendant carried on trade on his own account, and the work having been done for his customers, for which he himself had been paid, and whereby he lived, was to be deemed necessaries for which he should be liable.

Per Lord KENYON. The law will not allow an infant to trade. The substratum of the present action is, therefore, that which by law cannot be done. No action can therefore be maintained for work done in the course of it.

The plaintiff was nonsuited. (*a*)

Garrow

(*a*) In the case of HITCHCOCK *v.* TYSON, Sittings at Guildhall in *Hilary* Term, 1786, before *Buller* Just.—the pleadings were the same as in the above case; but the defendant had paid money into Court.—*Mingay* for the plaintiff at the trial objected: that the defendant having paid money into Court, could not avail himself of his infancy, the paying money into

Court

1796.

Dilk *against* Keighley.

Garrow and *Wood* for the plaintiff.

Mingay for the defendant.

Vid. *Wittingham* v. *Hill*, *Cro. Jac.* 494. *Whywall* v. *Champion*, 2 *Stra.* 1803. *Espin. Dig. N. P.* 162.

Court being an admission of the plaintiff's right of action. But Mr. Justice *Buller* ruled that he might, as the money paid into Court might be for necessaries; and the plaintiff was nonsuited.

Jones *against* Perry.

Wednesday, June 22d.

In an action on the case for keeping a mischievous dog, by which the plaintiff's child was bitten.—Report of the dog having been before bitten by a mad dog, is evidence to go to the jury that the plaintiff knew the dog was mischievous and ought to be confined, on the count stating that fact—particularly if the defendant, by tying the dog up, shewed some knowledge or suspicion of the fact.

THIS was an action on the case. The declaration contained three counts; the first, for keeping a dog, knowing him to be mad; the second, for keeping a fierce and savage dog without being properly secured; the third, for keeping a dog used to bite; with the usual *scienter* to all the counts—by which the plaintiff's child was bit and torn, and in consequence thereof died *per quod servitium amisit.*

Plea of not guilty.

It appeared in evidence, that the dog had been tied up in a cellar belonging to the defendant, but the rope or chain by which he was fastened was of such a length, that it suffered him to go to the curb-stone on the opposite side of the street: the dog broke through a little wicker gate into the street, and tore the plaintiff's child; it was carried to the salt water; but after its return, was seized with the hydrophobia and died.

A witness was asked if she had not heard in the neighbourhood, that *Perry* the defendant's dog had been bit by a mad dog.

Mingay objected to the question as not evidence.

Lord Kenyon said that it might be asked; for if common report was, that the dog had been bit, a certain duty attached on the defendant to keep the dog properly secured.

*[483] *No evidence was given that the defendant knew that the dog had been bit by a mad dog, or that he was used to bite, or was even a vicious animal. The evidence on the contrary proved, that the dog, till a very short time before the accident, went in common about the streets, and was very good tempered and tractable.

Mingay

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JONES *against* PERRY.

Mingay for the defendant then insisted, that the *scienter* was the ground of the present action, which if not expressly proved, the action fell to the ground: that the evidence in the present case went expressly to negative it, as it did not appear by any evidence, that the defendant knew the dog to be mad, fierce, unruly, or used to bite.

Lord KENYON. There are three counts in this declaration, and I have no doubt there is evidence to go to the jury that the dog was a fierce and unruly dog, and not properly secured: but not that the defendant knew him to be mad or used to bite, and therefore this is not a case for vindictive damages.

Such a case as this I believe never appeared before; but I am clearly of opinion the action is maintainable. Report had said the dog had been bitten by a mad dog; it became the duty of the defendant to be very circumspect: whether the dog was mad or not, was matter of suspicion; but it is not sufficient to say, "I did use a certain precaution." He ought to use such as would put it out of the animal's power to do hurt: here too the defendant shewed a knowledge that the animal was fierce, unruly, and not safe to be permitted to go abroad, by the precaution he used to tie him up; that precaution has not been
[484] sufficient, and for want of it the injury complained of has happened. I am clearly of opinion the plaintiff is entitled to recover.

The jury found a verdict for the plaintiff, damages 30*l.*

Erskine and *Lawes* for the plaintiff.

Mingay for the defendant.

Wednesday, June 22d.

WINCKWORTH *against* MILLS.

A promise by the indorser of an unpaid note, to indemnify the holder if he will proceed to enforce payment against the other parties on the note, must be in writing, or it is void under the statute of frauds.

ASSUMPSIT for money paid, laid out, and expended to the defendant's use, with a count against him as indorser of a promissory note.

The plaintiff was indorsee of one *Brough*, who was the indorsee of the defendant, who was himself the indorsee of *Taylor* and son, of a promissory note drawn by one *Sharp* in favour of *Taylor* and son, for 60*l.* payable three months after date at *Taylor*'s house.

When the bill became due, the plaintiff's clerk called for payment

payment of the note at *Taylor*'s house, but by mistake left it behind; he immediately returned and informed *Taylor* and son of the circumstance, and demanded it; but they denied having it, and it was considered as lost.

The plaintiff and *Brough* immediately waited on the defendant, and informed him of the circumstance. Whereupon he furnished them with a copy of the note, and promised, if they would endeavour to recover the amount of it from *Taylor* and [485] son, or from *Sharp*, that he would indemnify them.

They applied to *Sharp*, whom they found was a man of no substance. They afterwards applied to *Taylor* and son, and they, on being threatened, paid 30*l.* in part, and gave a new security by a note for the remaining 30*l.*

This last note not being paid when due, an action was brought on it against *Taylor* and son, and a judgment obtained on it by default; they brought a writ of error on the judgment, and then became bankrupts. Upon this *Winckworth* the plaintiff now brought his action to recover from *Mills* the defendant the expenses he had been put to in endeavouring to recover the money from *Taylor* and son, on *Mills*'s promise of indemnifying him; and added a count against him as indorser of the original note.

Lord KENYON asked if there had been any note in writing from *Mills* to the plaintiff, promising to indemnify him in the manner stated.

He was answered in the negative; but it was contended that it was not necessary, *Mills* the defendant being himself a party to the note, and to be benefited by the proceedings against *Taylor*.

His Lordship then added, that he was of opinion the action could not be supported to recover that part of the demand claimed under the promise of indemnity; that it was a promise for the debt and default of another, and so could not under the statute of frauds be maintained without a note in writing; but as to the unpaid part of the original note, the plaintiff was entitled to recover it.

The counsel for the plaintiff seeming to be dissatisfied with [486] his Lordship's ruling, he offered to save the point, but they declined it.

Verdict for 30*l.* which was acquiesced in.

Erskine and *Russell* for the plaintiff.

Mingay

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Mingay for the defendant.

Vid. *Stephens* v. *Squire*, 5 *Mod.* 213. *Read* v. *Nash*, 1 *Wils.* 305. *Fish* v. *Hutchinson*, 2 *Wils.* 94.

SITTINGS AFTER TERM AT GUILDHALL.

June 29th.

SMITH *q. t. v.* PRAGER.

It is not an objection to the borrower of money being a witness to prove the usury in a *qui tam* action, that he is then indebted to the plaintiff on the balance of account in which the sums lent, and for which the action is brought, were included, if those sums were paid.

THIS was an action of debt *qui tam*, brought to recover the amount of several penalties for usury.

There were several counts in the declaration; but the evidence applied to two of them only.

In the first of these counts the plaintiff declared that the defendant, on the 17th day of *September*, in the year of our Lord 1795, corruptly and against the form of the statute, &c. did take of one —— *Bromer* the sum of 11*l.* for the forbearance of the sum of 900*l.* from the said 17th day of *September* to the 3d of *October* following, &c.

*[487]

*In the second the plaintiff declared in like manner, that the defendant had taken from the said —— *Bromer* the sum of 42*l.* on the 13th of *October* 1795, for the forbearance of payment of 2000*l.* from the 13th of *October* to the 26th of the same month.

To prove these usurious transactions *Bromer* was called as a witness.—He was at the time an uncertificated bankrupt. The sums mentioned in the two counts, together with the interest, were stated to have been paid at the times stipulated; but he was still indebted to the defendant in a balance of 4000*l.* on a running account for different loans of money, in which the two above-mentioned sums were included.

Erskine for the defendant objected: that he was an incompetent witness, on the ground that there being still a large balance due to the defendant, and for which he had an option either to sue *Bromer* at law, or to come in under the commission; that *Bromer* was interested in impeaching the several transactions respecting the different loans of the money, which were items affecting the general balance, and which would prevent the defendant from recovering at law if the witness established the usurious transaction, or prevent the defendant from proving

1796.

SMITH *against* PRAGER.

proving under his estate, and so increase his own allowance or the possible surplus. And as to the two counts in particular,* it was further urged, that even were payment to enable the borrower of money to become a witness as to usury in the loan, it should be payment of the particular sums borrowed; whereas here, there being several loans of money and several payments, the payments must be taken to have been made on the general account, not on account of the particular sums stated in the* [488] two counts in the declaration.

For the plaintiff the case of *Abrahams* q. t. *v. Bunn*, 4 *Burr.* 2251. was relied on, as establishing the competency of the borrower of money being a witness to prove the usury in the loan, and as to the general objection that it went to his credit only.

Lord KENYON overruled the objection, and permitted the witness to be examined. His Lordship said, that since the case of *Bent* v. *Baker*, 3 *T. R.* 27. the distinction between credit and competency was well established; and that rule was, that unless the witness was directly interested in the event of the suit, or could avail himself of the verdict to be given in the cause in which he was then called for his own advantage, the objection went to his credit only, not to his competency.—If the verdict in the present case was found for the plaintiff, *Bromer* could not avail himself of it in any way if sued by *Prager*, the defendant at law, nor prevent his proving the balance under his commission.—This came within the principle in the case of *Bent* v. *Baker*, to which, his Lordship said, he had uniformly conformed himself.

Verdict for the plaintiff on both counts.

Law, *Dallas*, and *Giles*, for the plaintiff.

Erskine, *Garrow*, and *Gibbs*, for the defendant.

In the next term (*a*) a new trial was moved for; but the Court concurred in opinion with the Lord Chief Justice, and discharged the rule.

(*a*) 7 Term Rep. 60.

1796.

Thursday, June 30th.

Christian *against* Coombe.

Where a policy has been adjusted with a full and fair disclosure of all the circumstances, it is conclusive on the parties, and the insurer is bound.—*Aliter*, where there has been fraud, mistake of the law, or in a material fact. The protest is of itself evidence only to contradict the captain's evidence; not to shew a variance between it and the condemnation.

CASE on a policy of insurance, dated 16th *September*, 1794, on the ship ——, and goods at and from *Leghorn* to *Gibraltar*, with liberty to touch at *Carthagena*.

The ship was captured in her voyage by the enemy, and condemned as lawful prize.

The case for the plaintiff was, that he had laid before the defendant's brother, who acted for him, all the papers and documents respecting the loss, the condemnation, &c. which he had perused, and then had settled and adjusted the policy; upon which the plaintiff's counsel contended, that where there was a full and fair disclosure of all the circumstances of a loss,—where all the papers and documents respecting the ship had been fairly laid before the underwriter, and he had adjusted the loss, that he should be thereby concluded.

Lord Kenyon said, that he assented to that position as a general principle: but that where there were the exceptions as of fraud, or where the underwriter was mistaken in the law or in a material fact; under those circumstances he would not hold the adjustment so made to be conclusive.

The plaintiff then proved, that he had laid before Mr. *Coombe*, the plaintiff's brother, the bill of lading, the translation of the condemnation of the vessel, and other papers on the subject; that a discussion had taken place with Mr. *Coombe*, who read the act of condemnation, which ended in adjusting the policy.

[490] It appeared that the captain's protest had been received after the adjustment had taken place.

This was the plaintiff's case.

Garrow for the defendant said, that if the defendant was not precluded by the adjustment from going into his defence, he was in possession of what would be a good defence at law, namely, that though the goods were taken in for *Gibraltar*, it was with a view to run them into *Genoa*.

To allow the defendant to go into evidence to open the adjustment, he proposed to shew, that at the time when the other papers were produced and the loss adjusted, the protest, which was a material piece of evidence, had not been shewn to the underwriters, and that it was important, inasmuch as it varied

materially

1796.

CHRISTIAN *against* COOMBE.

materially from the condemnation, and so was a fraud on the underwriters.

To prove this fact he proposed to read the protest.

Lord KENYON. A protest is inadmissible evidence in chief. It may be read to contradict the evidence which the captain who made it may have given at the trial; but under such circumstances only.

The evidence was therefore rejected, and the plaintiff had a verdict.

Erskine and *Giles* for the plaintiff.

Garrow and *Bayley* for the defendant.

END OF TRINITY TERM, IN THE KING'S BENCH.

IN THE COMMON PLEAS.

SITTINGS AFTER TERM AT GUILDHALL,

[491]

FLOWER *against* PEDLEY.

Where in an action of slander the whole of the words laid in any one count constitute the slanderous charge, the whole must be proved.—*Aliter*, where there are distinct slanderous allegations in any count, proof of any of them is sufficient.

THIS was an action on the case for slanderous words spoken of the defendant being a trader.

Plea of not guilty.

There were two counts only in the declaration.

The words laid in the first count of the declaration were, "I thought *Flower* would be off when he saw me; he don't like to see my face: I know how he is going on; he is selling coals at a shilling a bushel to pocket the money, and become a bankrupt to cheat his creditors."

In the second count the words were laid only, "He is selling coals at a shilling a bushel to pocket the money, to become bankrupt to cheat his creditors."

The plaintiff proved the speaking of the words as laid, with the exception of those, *to become a bankrupt*, and then closed his case.

Adair, Serjt. contended, that upon this evidence the plaintiff should be nonsuited; that the words were only actionable as they applied to the defendant as a trader: that the only words in

1796. — Flower *against* Pedley.

in the declaration upon which a slanderous import could attach, were those imputing a probable bankruptcy to the plaintiff; which words had not been proved.

The counsel for the plaintiff answered, that it was not necessary to prove the whole of the words precisely as laid, provided the substantive part was established, containing the charge of a slanderous nature: in the present instance the words as laid contained two specific charges, the one charging him with probable bankruptcy, and the other with dishonesty in attempting to cheat his creditors: that this latter charge was made out in evidence, and being actionable in the case of a trader, would support the words as laid in the declaration, though not substantively laid in any one count.

Eyre, Chief Justice. The whole of the words as laid in either of the counts of the declaration, have not been proved: if however any one count does contain a number of substantive slanderous charges, proof of any of them, I apprehend, has been held to be sufficient; and I am disposed to be of that opinion. But in the present case the whole forms one charge, "he is selling coals at one shilling a bushel to pocket the money, and become a bankrupt to cheat his creditors;" the mode by which he was to cheat his creditors was, by becoming a bankrupt: the whole therefore constitutes one general charge, not two distinct ones of becoming a bankrupt, *and* of fraud, in intending to cheat his creditors. This allegation therefore ought to have been made out in evidence; and not being so, I am of opinion the plaintiff must be called.

Shepherd, Serjeant, and *Espinasse*, for the plaintiff.

Adair, Serjeant, and *Kyd*, for the defendant.

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Atkyns and Batten *against* Amber.

A broker who has advanced money on goods, may declare on a special contract respecting the sale of them as his own goods—nor is it a variance, though the sale note mentions the name of the principal.

THE declaration in this case stated, "That in consideration the plaintiffs would sell to the defendant a cargo of *Memel* timber, the defendant undertook to pay them with a bill at two months the amount of the value of the timber. It then averred the delivery of the timber, and assigned a breach in the not giving the bill as agreed."

The defendant pleaded the general issue and notice of set-off "of

"of a debt due by one *Hippius* to him; and that the timber in question was the property of *Hippius*."

The case on the part of the plaintiffs was, that *Hippius*, who had been a timber-merchant, employed them as his brokers; and they were in the habit of advancing him money on the credit of the cargoes he expected to arrive.

At the time of the transaction in question, which was in *December* 1795, *Hippius* was in the plaintiff's debt; at which time *Hippius*, having occasion for further assistance, applied to the plaintiffs to make him a further advance on the credit of a cargo on board the *Sally*, then shipped on his account.

The plaintiffs accordingly, on the 2d of *December* 1795, accepted two bills of exchange drawn by *Hippius* on them for 540*l.* each, on account of timber on board the ship *Sally*; *Hippius* was then 600*l.* in their debt: and at the same time *Hippius* gave them an undertaking in writing, dated 1st *December* 1795, authorizing them to dispose of the cargo of the *Sally* on account of their engagements for him, and an [494] order on one *Hill*, the rafter or person who receives the cargo, to deliver the timber to them.

This timber was afterwards sold by *Atkyns* one of the plaintiffs, to *Amber* the defendant. The sale-note was "of so much timber sold by the plaintiffs on account of *J. G. Hippius*: bill at two months."

Before *Atkyns* delivered or sold the timber to the defendant, he asked him if *Hippius* was in his debt; the defendant said he was not, and that he would go before the Lord Mayor and make oath of it.

Soon after, *Hippius* became a bankrupt.

Cockell, Serjeant, contended, that the plaintiffs should be nonsuited, on the ground of a variance, the contract stated in the declaration being with the plaintiffs, whereas that given in evidence was between *Hippius* and the defendant.

He contended that the transaction should have been truly stated, and as the fact was; namely, that they being entitled to a lien on the timber, had been content to part with such lien, and to deliver the timber to the defendant in consideration of his accepting certain bills.

Adair, Serjeant, on the other side. A broker may maintain an action in his own name, even where the principal is known, though payment to the principal would be good: but where a factor has advanced money on the credit of goods, the principal cannot

1796.

ATKYNS *against* AMBER.

*[495]

cannot stop the money in the hands of the buyer, it then becomes the sale of the broker. This is so resolved in the case of *Drinkwater* v. *Goodwin*, *Cowp.* 251. In this case the plaintiff had* advanced money on the credit of the cargo, and there was a lien given to them under *Hippius*'s own order.

The sale is of him who has the property in the things sold: in this case *Hippius* had transferred all his property in the timber to the plaintiffs; they were possessed of the goods, and the sale was on their account.

EYRE, Ch. J. The objection is, that the evidence does not correspond with the declaration. The sale-note appears to be a sale by *Hippius*; and if it could be proved that, by supposing the contract to be with *Hippius*, the defendant suffered, the defendant should be at liberty to set up that sale against the plaintiffs: no such thing appears. It is proved that the plaintiffs had at least a special property in the timber; the sale was therefore theirs, and I am of opinion it is not a variance.

The plaintiffs had a verdict.

Adair, Serjt. *Le Blanc*, Serjt. and *Wigley*, for the plaintiffs.

Cockell, Serjt. *Shepherd*, Serjt. and *Lawes*, for the defendant.

END OF TRINITY TERM, 36 GEO. III.

SUMMER ASSIZES

AT MAIDSTONE, *July*, 1796,

BEFORE LORD KENYON.

DOE ex dem. BOWERMAN *against* SYBOURN.

A bill in Chancery is not evidence against the party filing it of the facts charged in it, even of those upon which the prayer for relief is founded. It is only evidence of the existence of such a bill and of the matters in issue between the parties, in order to admit evidence from the answer or depositions taken in the cause.

THIS was an action of ejectment, brought to recover the possession of premises at *Lewisham* in *Kent*.

The title relied upon on the part of the lessor of the plaintiff was, That in the year 1760, one *Stoddard* had mortgaged them to *George Pym* for a term of 100 years. In 1766, the mortgage money not being paid, and *Stoddard* being then dead, *George Pym* got into possession, and afterwards levied a fine of the premises to the use of himself in fee.

In the year 1778, the lessor of the plaintiff filed a bill against *George Pym*, the mortgagee, for an account; to this *George Pym* appeared, but his death soon after taking place, no answer had been put in; but he by his will had devised the premises to trustees, to the use of his son *John Pym*, and in trust to convey them to him on his attaining the age of 21 years.

In 1789, *John Pym*, being then of age, made a lease of 81 years to the defendant *Sybourn*, to commence from *February* [497] 1791, at which time a former lease which he then had would expire.

In 1790, the bill filed for an account against *George Pym* was revived against his representatives; and in 1794, a decree for redemption was pronounced in favour of *Bowerman*, the lessor of the plaintiff; and *Sybourn* the defendant, who was at that time in possession as tenant of part of the premises, was ordered to attorn tenant to him; which he had done.

Under

1796.

Bowerman *against* Sybourn.

Under the title, therefore, derived from this decree the lessor of the plaintiff relied; the defendant's title was under the lease made to him by *John Pym*, which, if good, entitled him to hold the possession.

The lessor of the plaintiff, to impeach this title, contended, that the lease made by *John Pym* was void, inasmuch as by his father's will the estate had been given to trustees on trust, to assign to *John Pym* when he came of the age of 21 years; which assignment they affirmed never had taken place, so that at the time of the lease made to *Sybourn* in 1789, the legal estate was in the trustees and not in him.

To establish this fact, the lessors of the plaintiff produced a bill in equity, filed in 1790, in which *Sybourn*, the present defendant, and *John Pym*, were complainants against the lessor of the plaintiff *Bowerman*, and one *Henry Holt*, who was the surviving trustee under *George Pym*'s will; which bill stated a former lease made in the year 1770, by *George Pym* to *Sybourn* for 21 years; the will and death of *George Pym*; and that *H. Holt* was the surviving devisee in trust;

[498] and praying that a conveyance of the legal estate should be made to *John Pym* in pursuance of his father's will, and that *Holt* might be restrained from compelling *Sybourn* to pay his rent to him.

This they contended was evidence; that in 1790 *John Pym* had not the legal estate, so that of course the lease made by him in 1789 was void.

This evidence was objected to.

The counsel for the plaintiff, in support of the evidence offered, cited *Buller's Nisi Prius*, 235, wherein it is laid down, " that a bill in Chancery is evidence against the complainant; for the allegations of every man's bill shall be supposed true: nor shall it be supposed to be preferred by a counsel or solicitor without the parties' privity, and therefore it amounts to the confession and the admission of the truth of any fact." They further argued, that in this bill the prayer for relief was founded on those very facts, which must therefore be taken to be true, as the foundation of their equity; though they admitted that where the facts stated were mere inducement, it might be different.

Lord Kenyon said, The evidence was clearly inadmissible; that a bill in equity was not evidence of any of the facts contained in it, farther than to shew that such a bill did exist, and to

ascertain

ascertain what facts were in issue between the parties, so as to let in evidence of the answer to such bill, or of the depositions of witnesses taken in the cause; that it was to be taken as the suggestion of counsel merely, and not as evidence or admission of facts.

His Lordship therefore rejected the evidence.

The counsel for the plaintiff then replied that, as it appeared from the will that there was a devise to trustees in trust to convey to *John Pym*, when he attained the age of 21 years, such conveyance ought to be shewn. [499]

The counsel for the defendants said that a conveyance might be presumed; and cited *England ex. dem. Sybourn* v. *Slade*, 4 *Term Rep.* 682, as in point.

Lord KENYON said, that as the trustees were bound to convey to *John Pym* on his attaining the age of 21 years, it was to be concluded that they had done their duty; and that the jury might presume that they had done so pursuant to their trust, on his attaining the age of 21 years.

The plaintiff was nonsuited.

Shepherd, Serjeant, and *Leach*, for the plaintiff.

Runnington, Serjeant, *Palmer*, Serjeant, and *Espinasse*, for the defendant.

In the next term, *Shepherd*, Serjeant, moved for a new trial on the grounds above relied; but the court of *B. R.* refused a rule to shew cause. Vid. 7 *T. Rep.* 3. where the following case is cited; *Taylor* v. *Cole*, Sittings after *Hil.* 1789, in which Lord *Kenyon* held the same doctrine, with the exception, that a bill in Chancery (*a*) filed by an ancestor, was evidence to prove a family pedigree stated therein, in the same manner as an inscription on a tomb-stone, or an entry in a family bible, which are evidence.

(*a*) Vid. Bull. N. P. 235.

GODFREY ex dem. —— *against* HUDSON, Sittings before *Michaelmas* Term 1788.

This was an action of ejectment.

The premises had been settled in trust, and there was a demise only by the *cestui que trust* without any by the trustee.

On an objection being taken, that the trustee in whom the legal estate was should have joined in the ejectment, *Bower* for the plaintiff said, that there had been several late determinations in the Court of *King's Bench*, that such a demise as the present was sufficient to maintain the ejectment. [500]

Lord KENYON said, that that doctrine had long been to him doubtful; and he wished it to be carried by special verdict to the House of Lords. He said there was a class of cases on this subject which had his perfect assent; these were, where from the circumstances a presumption could be raised

1796.

Bowerman *against* Sybourn.

raised that a conveyance had taken place from the trustee to the *cestui que trust*. Lord *Grosvenor*'s case in the *Exchequer*, and the great case of Sir *J. Lowther* against the Duke of *Portland* had been decided on that ground; but where there was no room to presume a conveyance, or the contrary appeared, he was at a loss to conceive how it could be supported. The difficulty to his mind was this; the Court was thereby assuming a jurisdiction which did not belong to it, and of a nature which they never possessed. Trust estates were creatures of a Court of equity; and at no time had the Court of *King's Bench* exercised jurisdiction over them. Where a plaintiff sets up a legal title, it is in the judgment of the Court by what evidence they will be satisfied it exists; but wherever the title relied on is such as that Court has no jurisdiction over, they cannot assume to themselves such power.—He observed, that it had been said at the bar, that when the equity was clear, a Court of Law would entertain the case, but not where it was doubtful. That doctrine he could not accede to; what is clear to one man may be doubtful to another. The law itself is clear in all cases, though, from the fallibility of man, ingenuity may in some cases throw a veil before it, which it may be difficult to see through.

The plaintiff, not being able to bear the expense of a special verdict, was nonsuited.

SUMMER ASSIZES

AT GUILFORD,

CORAM BARON HOTHAM.

[501]

Doe ex dem. Martin et al. *against* Watts.

If a lease is made by a tenant for life, which turns out to be void, and after his death the next in remainder receives rent from the tenant, he thereby creates a tenancy from year to year, and the tenant is entitled to notice to quit.

EJECTMENT for a house and premises at *Bermondsey*. *James Martin* was tenant for life, with power to make leases for 12 years in possession, without taking a fine, and reserving the best rent that could be got, remainder to *Thomas Martin*, lessor of the plaintiff in tail.

In

1796.

MARTIN *against* WATTS.

In *June* 1779, *James Martin* made a lease to *Stubbs* for 21 years; but such a lease as was not warranted by the power, there being reserved on it a rent of 36*l.* *per annum*, the premises being worth nearly double.

In *June* 1794, *James Martin* died, having received the yearly rent according to the lease.—After his death, he having died in the middle of a quarter, a person who received rent for *Thomas Martin*, received the rent from the defendant, who was in possession as assignee of *Stubbs*, and paid over part to the executors of *James Martin*, and part to *Thomas Martin*.

The lessor of the plaintiff considering the lease as void, not having been made pursuant to the power, brought the ejectment without having given any notice to the defendant to quit. [502]

The defendant relied on the acceptance of rent as an admission of tenancy, at least as tenant from year to year; and that therefore, as the tenant, he was entitled to notice to quit.

Shepherd, Serjeant, for the lessor of the plaintiff, contended, that the lease in question being actually void, no acceptance of rent could set it up, or make it valid; and cited *Jenkins* v. *Church*, *Cowp.* 482; and as expressly ruling the point, *Goodtitle* on dem. *Adeane* v. *Prentice*, *Lent* assizes in *Surrey*, before Mr. Justice *Gould*, *Espin. Dig. N. P.* 464; where that judge was of opinion, that acceptance of rent under such circumstances did not create any tenancy; and that the remainder-man might maintain an ejectment for the premises without any previous notice to quit.

It was answered by the defendant's counsel, that on the death of the tenant for life, the remainder-man was at liberty to consider the defendant as a trespasser, being in under a void lease, and to proceed against him as such without notice; but that he could not affirm the contract as to one purpose, and disaffirm it as to another, nor accept rent which implied a contract, and afterwards, at his pleasure, disaffirm it, and consider the party as a trespasser, by bringing the ejectment.

Baron *Hotham* said, he was of opinion that the defendant was entitled to notice to quit; the rent being received *eo nomine* as rent, which was evidence of a contract, and that the defendant was not then considered as a trespasser; that though the

1796. — Martin against Watts.

the cases had decided the lease to be void, they certainly did not go the length of deciding, that the act of the person in remainder might not create a new tenancy from year to year, which in this case he was of opinion he had done.

The plaintiff was nonsuited.

Shepherd, Serjeant, and *Const*, for the plaintiff.

Garrow and *Marryat* for the defendant.

In the next term (*a*) the plaintiff moved to set the nonsuit aside; but the Court of King's Bench concurred in opinion with the Judge, and discharged the rule.

(*a*) 7 Term Rep. 4.

[504]

IN THE KING'S BENCH.

SITTINGS AFTER MICHAELMAS TERM, 37 GEORGE III.

Storey *against* Bloxam, Esq.

If a cause after issue joined has been referred and an award made, which award not being acquiesced in by the plaintiff, he proceeds in the cause, the defendant should plead the award as a plea *puis darreign continuance*—*comme semble*.

THIS was an action of *assumpsit*, to recover the price of a mare sold by the plaintiff to the defendant.

The defendant pleaded *non-assumpsit*, and denied the sale.

After issue had been joined, the parties had agreed to refer the cause to arbitration; the arbitrators had met, and, after calling in an umpire, had made an award in favour of the defendant.

The award having been irregularly made, was not submitted to by the plaintiff, and the cause now came on to be tried on the original pleadings, when *Erskine*, as counsel for the defendant, proposed to give the award in evidence.

Gibbs for the plaintiff insisted, that it could not be so given in evidence, but should have been pleaded as a plea *puis darreign continuance*.

Lord

1796.

STONARD *against* BLOXAM.

Lord KENYON said, that it was a question upon which he had considerable difficulty, and upon which he would be cautious in giving a positive opinion at *Nisi Prius*. That payment was constantly given in evidence, under the general issue; at the same time that a release given after issue joined was always necessary to be pleaded? that the impression of his mind was, that it could not be given in evidence, but must be pleaded as a plea *puis darreign continuance*.—The evidence was therefore not admitted. [505]

The cause was afterwards referred.

Gibbs and *Espinasse* for the plaintiff.

Erskine for the defendant.

SPARROW *against* HAWKES.

If at the end of the year, when the tenancy is from year to year, the landlord accepts another person as tenant in the room of the former tenant, without any surrender in writing, such acceptance shall be a dispensation of any notice to quit.

CASE for the use and occupation of a house on the *Chelsea* road.

Plea of *non assumpsit*.

The action was brought to recover a quarter's rent from the 25th *March*, 1794, to the *Midsummer* of the same year.

The plaintiff proved that the defendant had occupied the premises for four or five years preceding the 25th of *March*, as a tenant from year to year, and had quitted at *Lady-day* 1794, without having given any notice of quitting to the plaintiff; that he had put into the house a person of the name of *Pickering*, who had never been accepted as tenant by the plaintiff, and who had quitted some time before *Midsummer*, but paid no rent: the plaintiff therefore brought this action to recover the rent for that quarter, he having let the house to another tenant from that time.

The defence relied on was the acceptance of this *Pickering* by the plaintiff as his tenant; which the defendant's counsel contended was a surrender to the plaintiff of all the defendant's interest, and an admission by him of *Pickering's* tenancy; and therefore *quoad* the defendant a complete discharge. [506]

Erskine in reply contended, that notwithstanding this, the defendant was not discharged; for that not having given legal notice to quit at *Lady-day*, the term after that had a legal continuance, inasmuch as there was no *legal surrender*, which

 he

1796. SPARROW *against* HAWKES.

he contended, under the *statute of Frauds should be in writing*, and to that purpose cited the case of *Taylor* v. *Chapman*, Sittings after *Easter* term 1795; a manuscript report of which he read to the following effect: It was an action on the case, for use and occupation of a house, on a taking at 20*l*. *per annum*. The defendant offered evidence, to shew that the plaintiff had agreed to put an end to the holding at the end of a quarter, and to let him off on payment of that quarter's rent. Lord *Kenyon* said, that that would not serve the defendant, as all surrenders of any leases or uncertain interest must be by note in writing; so that there being no legal surrender, the party continued tenant. That case was pressed as applying to the present; but it was answered that here the year was at an end, and so the contract determined.

Lord KENYON said, that the matter insisted on by the plaintiff's counsel might hold where there was a letting upon [507] lease; but in holdings, such as the present from year to year, if the landlord consented to take another person in the room of the tenant at the end of the year, such was a dispensing with notice, and an admission of such person in lieu of the tenant; and that after that, it should never lie in his mouth to say that the former tenancy continued; if therefore there was evidence given that the plaintiff had so accepted *Pickering*, he would hold the present defendant to be discharged.

The defendant called *Pickering*; who proved a treaty between him and the plaintiff for the house, and an agreement by the plaintiff to white-wash it, and take him as tenant. Verdict for the defendant.

Erskine and *Henderson* for the plaintiff.

Mingay for the defendant.

JONS *against* PERCHARD et al. Sheriffs of LONDON.

If a sheriff's officer takes money from a person *colore officii* for any thing done in the course of his duty, and to which money he is not entitled by law, an action lies against the sheriff, though there is no evidence of the money coming to his hands.—The office of a sheriff's bailiff is particular and personal, and there can be no such thing as partnership between two such officers, so as that the act of one shall bind the other; beside the principle of law in torts is against it.

THIS was an action of debt brought to recover several penalties given by stat. 6 *H*. 6. and 32 *Geo*. 2. *c*. 28, on the ground of one *Whitcombe*, who was one of the bailiffs to the sheriff,

sheriff, having taken a sum above the legal fees to which the defendant was entitled on giving bail, and for the bail-bond. There were also two counts for money had and received, and laid out and expended.

The money was taken by the bailiff; and it was contended, that unless the money was proved to have come to the sheriff's hands, it could not be recovered in an action against the sheriff; but the action would lie only against the bailiff. [508]

Lord KENYON ruled, that if it appeared that the money had been wrongfully taken by the bailiff, under colour of his office, the sheriff was liable; and that it could be so recovered in an action against him for money had and received.

The declaration stated, that one *Mary Harrison*, widow, had sued out a certain writ; and in setting it out, it stated "that the sheriff was commanded to take, &c. to answer the said *Mary Harrison*," without the word *widow*.

This was objected to as a variance; to which Lord *Kenyon* assented: but on referring to the declaration, it was answered, that it having stated that one *Mary Harrison*, *widow*, had sued out a writ, and the declaration purporting only to set out the tenor, and it having in that recital words of reference, *viz. the said Mary Harrison*, that such was sufficient. His Lordship held that it was.

After giving in evidence an office-copy of the writ, in order to prove the warrant directed and delivered to *Whitcombe* as the sheriff's bailiff, the plaintiff called a bailiff of that name, but who in fact was not the *Whitcombe* to whom the warrant had been directed: having failed in procuring the production of the warrant from him, he was asked by the plaintiff's counsel, if he was not partner with the other *Whitcombe* to whom the warrant had really been directed.

Lord KENYON said, that could not be; that the nature of the office was particular and personal, and such, as that the bailiff only to whom the warrant was directed could be responsible for its due execution, or could bind the sheriff; if the idea of a partnership was admitted, suppose the case, that murder was committed in the execution of the warrant, could the partner be implicated? [509]

The plaintiff failed in producing the warrant, and was nonsuited.

Erskine and *Lawes* for the plaintiff.

Mingay and *Espinasse* for the defendant.

1796.

Thursday, Dec. 1.

MATTHEWS *against* HAYDON, Gent.

Where a clerk or servant has been sent to receive money for any person, he shall be a good witness for the person who paid it, to prove the payment over of it, without any release, though he might himself be liable on the receipt of it.—Where a person is employed to receive money for another, and he employs a third person to receive it for him, proof of the money having come to the hands of such third person is sufficient to make the person who employed him liable.

ASSUMPSIT for money had and received by the defendant to the use of the plaintiff.

To prove the money received, the plaintiff's case was, that he had employed the defendant, who was an attorney, to receive the money due to him on a bill of exchange.

A clerk to one *Dale* proved the receipt of the money by him, from the person by whom it was payable.

Dale was called, and proved that *Haydon* the defendant, had applied to him to permit one of his clerks to receive the money for him on the bill: that he had sent a clerk (the last witness) who brought back the money, which was put into the cash-box; but that he had no recollection, nor could he say that the defendant had received it; but he rather thought he had.

*When the two last witnesses were called, *Mingay* for the defendant objected to their giving testimony unless they were released, on the principle that the money having actually come to their hands, they would be liable to the plaintiff; and as the object of their testimony was to charge the defendant with the receipt of it, and so discharge themselves, that they should therefore be released by the plaintiff.

*[510]

Lord KENYON over-ruled the objection. He said, that it was the constant course of *Nisi Prius*, and was so decided *ex necessitate rei*, to admit the evidence of clerks and porters who were alone privy to the receipt of money, or the delivery of goods; and there was nothing to distinguish this case from the common one, and therefore he admitted them.

On the evidence of *Dale*, *Mingay* contended, that there was no proof of the receipt of the money by *Haydon* the defendant, or of its coming to his hands; which he contended to be necessary.

Lord KENYON. Where a person authorizes another to receive money for him, payment to the party so authorized is payment to the principal; and if this was the money of a third person, it is sufficient to charge him with the receipt. In this case the defendant empowered *Dale* to receive the money for him, by delivering to him the bill of exchange; and it being proved

proved to have come to *Dale*'s hand, it shall not be allowed to the defendant to dispute the receipt of it.—The jury found for the plaintiff. 1796.

MATTHEWS *against* HAYDON.

Garrow and *Marryat* for the plaintiff.

Mingay for the defendant. (*a*)

(*a*) PALETHORP *against* FURNISH, Sittings at *Westminster* after *Trinity* Term, 23 *Geo.* 3.

This was a declaration for goods sold and delivered.—Plea of *non assumpsit* and *non assumpsit infra sex annos.*—The plaintiff relied on a new promise as an answer to the statute of limitations, which was made by the defendant's wife, who managed the business, and generally gave orders, and paid for goods.

BULLER, J. (who sat for Lord *Mansfield*) held, that her promise was binding on the defendant, and took the case out of the statute of limitations; and ruled, that the promise of any servant or agent intrusted by the defendant to transact his business for him would have had the same effect.

Mingay and *Russell* for the plaintiff.

——— for defendants.

CROMWELL et al. *against* HYNSON.

Friday, Dec 3.

THIS was an action to recover the amount of a bill of exchange of which the following is a copy:

"*Jamaica, Montego Bay*, 4*th Sept.* 1795.

"Ninety days after sight pay to Mr. *Joseph Hynson*, or "order, 200*l.* sterling, value received, &c.

"BENJAMIN LYON."

"To Sir *P. H. Clerk*, Bart. at Messrs.
Davidson and *Graham*, *London.*"

This bill was indorsed by *Hynson* the defendant, to the plaintiff in *Jamaica*, where *Hynson*, (who was the master of a ship) then was: but his residence was in *England*, he having a dwelling-house at *Stepney Causeway*, where his family lived. [512]

The bill was presented for acceptance to the drawee, and refused; upon which it was immediately protested, and then sent to *Hynson*'s house at *Stepney Causeway* for payment, with notice of its non-acceptance.

1796.

Cromwell *against* Hynson.

Hynson was not then in *England*: but the bill was shewn to his wife, from whom payment was demanded; and she was informed of all the circumstances of non-payment &c.

This was given in evidence by the plaintiff.

For the defendant, *Garrow* stated his defence to be, 1st, That the notice given to *Hynson* the defendant as the indorser, should have been sent to *Jamaica;* where he was at the time when he indorsed the bill.—2dly, That a demand on the wife was not sufficient.—3dly, That it was necessary, and the established usage among merchants, which he stated he was prepared with evidence to shew, that when notice is given of the non-acceptance or non-payment of a bill, it should always be accompanied with a copy of the protest.

Lord Kenyon over-ruled all the objections, and the plaintiff had a verdict to the amount of the bill.

Erskine and *Const* for the plaintiffs.

Garrow for the defendant.

[513]

SITTINGS AFTER MICHAELMAS TERM AT GUILDHALL.

Harrison *against* Millar.

Where a number of owners of ships subscribe a joint fund proportioned to their property, and underwrite each other's property respectively, and are only liable to losses in their proportion of the fund so subscribed, it is not within the the stat. 6 *Geo.* 1. *c.* 18.

THIS was an action on a policy of insurance on the ship *Ann and Elizabeth*, bound from *Dantzig* to *London*.

The case, as it appeared in evidence, was, that several ship-owners in the north of *England* had formed themselves into a society, called the *Whitby Association*. The object was for the mutual protection of the property belonging to each. Each of the members paid into the hands of a treasurer a sum of money proportioned to his property in the shipping, which formed the stock of the society; and when any loss happened, it was paid by the treasurer out of the joint stock. The engagements were in the forms of policies of insurance, and were subscribed by each of the members, and each insured according to the respective value of his property; and they did not undertake collectively for each other.

On

1796.

HARRISON agianst MILLAR.

On this being made out in evidence, *Erskine*, for the defendant, objected: that the plaintiff could not recover, as this case came within the principle of the statute of 6 *Geo.* 1. *c.* 18. *s.* 1. which prohibits all insurances by corporations, and all societies or partnerships for assuring ships, &c. except those mentioned in the act; and cited *Sullivan* v. *Graves*, *Park Insurance* 8. and *Michell* v. *Cockburn*, 2 *H. Black.* 379. [514]

Lord KENYON overruled the objection.—His Lordship said the statute 6 *Geo.* 1. was levelled against companies or partnerships where there was a joint undertaking, and their joint credit held out as a security for insurances.—But that was not the case here; the association here undertake in their individual characters only, and in such characters have underwritten the policy. They stand in this respect as individual underwriters. The plaintiff is entitled to recover.

Vide *Lees* v. *Smith*, 7 *T. R.* 338, and the cases cited in that case; wherein it was decided, that where a company of ship-owners had agreed to insure each other's ships, and covenanted *severally*, but not jointly, to pay a certain sum in case of a loss, in proportion to their respective share; but further covenanted *that in case of the insolvency of any one of the members, or his inability to pay, that the proportionable part or share of such member should be made good by the other members of the company.* This latter covenant was held to bring an insurance so made within the stat. 6 *Geo.* 1.

Law and *Park* for the plaintiff.

Erskine for the defendant.

1796.

IN THE COMMON PLEAS.

SITTINGS AFTER MICHAELMAS TERM AT WESTMINSTER.

WALWYN and others *against* St. QUINTIN. (a)

If there are effects of the indorser in the hands of the acceptor, but none of the drawer, and the bill is unpaid and no notice has been given to the drawer, the holder may maintain an action against the drawer who has had no effects in the hands of the acceptor; nor can he defend himself on the ground of want of notice, there being effects of the indorser in the acceptor's hands: but he can, if time be given to the drawer. —Vid. *Tindal* v. *Brown*, 17 *Rep.* 167.—Securities left in the acceptor's hands to raise money, but on which no money has been raised, are not effects in the acceptor's hands.—Where a bill has been dishonoured by all the parties, and notice has not been necessary to be given to the drawer, he having no effects in the acceptor's hands, the giving time to the acceptor against whom an action has been brought does not discharge the drawer.

THIS was an action of *assumpsit*, brought to recover the amount of a bill of exchange drawn by the defendant on one *Deane*, in favour of one *Thomas*, and by *Thomas* indorsed to the plaintiffs, who are bankers.

Deane and *St. Quintin* lived at *Reading*. The bill was due the 27th *March* 1796, and was not paid either by *Thomas* the indorser, or by *Deane;* and no notice was given to the defendant (the drawer) till the first of *April*.

The defendant relied on the want of notice as the ground of his defence.

For the plaintiff it was answered, that this was a mere accommodation-bill, and that there were no effects of the defendant's in the hands of *Deane* the acceptor and that notice was therefore unnecessary.

To prove this fact, *Deane* was called; he said that *Thomas* having occasion for money, had lodged the title deeds of a house of his with *Deane* (who was an attorney) for the purpose of raising money; no money had *been raised at the time the bill was drawn or payable; and there were no other effects of *Thomas's* in the hands of *Deane* at any time.

EYRE, C. J. left it to the jury to say, whether this was a mere accommodation bill, or whether this constituted effects in the hands of *Deane*.

(a) See this case in 1 *Bos.* and *Pul.* 652.

The jury found that there were effects of *Thomas* in the hands of *Deane*.

Another ground upon which the plaintiffs contended that notice was dispensed with was, that in fact at the time the bill became due, *St. Quintin* had absconded to avoid his creditors.

To this point the evidence was, that *St. Quintin* (who had kept a school at *Reading*) had become insolvent, and had left *Reading*, having before compounded with his creditors: but the defendant proved, that after he had so left *Reading*, he had come to *London*, and kept a school; but it appeared to be in great obscurity, up two pair of stairs in *Tavistock Street*.

Upon this evidence the defendant's counsel contended that he was discharged.

His Lordship left it to the jury to say, whether *St. Quintin* had absconded to avoid his creditors.

The jury found that he had not.

The defendant's counsel then contended that he was discharged for want of regular notice. First, Upon the jury having found that there were effects in *Deane*'s hand. 2dly, Because the fact of his absconding, with intent to defraud his creditors, had been negatived by the finding of the jury.

For the plaintiffs it was answered, that the finding of the jury on the first point was decisively in their favour, as the fact of *Deane* having had effects of *Thomas* in his hands could not discharge *St. Quintin* the drawer, when the jury had found that there were no effects of his in the hands of the acceptor; and that it was of no importance from what quarter effects came into the hands of the acceptor, if they did not come from the drawer; as in such case only he could insist on notice, and avail himself of the want of it in his defence to the action. [517]

The second point was not pressed, as the plaintiff's counsel contended, that the first point being found in their favour, the fact of absconding was unimportant.

The Chief Justice said, he thought the finding of the jury was decisive against the plaintiffs. Effects were found in the hands of the acceptor; and as it seemed to be a bill drawn with a mutual understanding among all the parties, he thought notice was necessary: but another point having appeared in the cause, which he also thought decisive, he would take that into his consideration.

The point alluded to was this: About the month of *June*, the plaintiffs had sued *Deane* the acceptor, and *Thomas* the drawer,

1796.

Walwyn *against* St. Quintin.

drawer, on the bill. *Deane* had been an attorney at *Reading*; he being under difficulties, Mr. *Annesley*, member of parliament for that place, had applied to the plaintiffs for some indulgence for him, stating his situation, and that he had some prospect of being soon of ability to pay. In answer to that [518] application the plaintiffs had written to Mr. *Annesley*, consenting to grant some indulgence, and to give time to *Deane* for the payment.

The letter of Mr. *Annesley*, and that of the plaintiffs in answer to it, were produced.

The counsel for the plaintiffs contended, that by law this was no discharge to the drawer, as the holder of a dishonoured bill might, if he thought fit, give time to any of the parties, as, having a right to call upon all, he might make with them what terms he pleased; that in the case of *Johnson* v. *Kenyon*, 2 *Wils.* 262, it had been held that the holder of a bill might receive part of the money from the indorser, and recover the remainder from the drawer. They further urged, that the cases in which the drawer had been discharged on the principle of time having been given to the acceptor, was where the drawer was entitled to notice, which here was not the case, there being no effects of the drawer's in the hands of *Deane*. But in the present case the giving time was not *of itself* a discharge; it must be explained *quo animo* it was done. The giving time which is a discharge, is, where the holder of a bill, at the time it becomes due, consents to give the acceptor time; there he enters into a new contract with the acceptor, and trusts to his security only; and so are all the cases; but where a bill has been for some time unpaid, and the holder seeking to recover against all the parties, allowed some time to one of them, that shall not operate as a discharge.

His Lordship, however, was of opinion, that this giving time was by law a discharge, and directed a verdict for the defendant.

[519] *Shepherd*, Serjeant, and *Espinasse*, for the plaintiffs.

Clayton, Serjeant, and *Holroyd*, for the defendant.

In the next term, *Shepherd*, Serjeant, moved for a new trial (*a*), when the other Judges of the Court of Common Pleas differed in opinion with the Lord Chief Justice, and granted a new trial.

(*a*) Not yet reported, but most likely will appear in those to be published by Mr. A. Moore, in continuation of Mr. N. Blackstone's.

Reported 1 Bos. and Pull. 652; *postea* to the plaintiff

IN THE COMMON PLEAS.

SITTINGS AT GUILDHALL.

COLLINS *against* MARTIN et at.

Bankers in *London*, to whom bills are paid by persons who keep their accounts with them, may pledge them as a security for money to be advanced to the bankers, if the person who so advances the money had no notice of the state of the account between the banker and his customer.

TROVER for two bills.of exchange.

Collins the plaintiff lived in *Kent*, and kept an account with Messrs. *Nightingales* as his bankers.

On the 2d of *May* he sent up the bills in question to be received by the bankers, and to be carried to his account.

On the 18th of *June*, the *Nightingales* having occasion for money, applied to the defendants, who were also bankers, to procure it, on a deposit of good bills: the defendants agreed to accommodate them, and lent them 1000*l.* and the *Nightingales* gave them an acknowledgment in writing, that they had received 1000*l.* on account of four bills deposited in their hands; two of these belonged to the plaintiff.

The bills, as they were received from *Collins*, had been entered in *Nightingales*' books, and at the time of the transaction with the defendants, a considerable balance was due by *Nightingales* to *Collins* the plaintiff.

Shepherd, Serjeant, for the plaintiff contended, that the defendants had by law no power to hold the bills, inasmuch as they derived their title from the *Nightingales*, who had pawned [521] the bills, which by law they had no right to do: he stated that the case of bankers was similar to that of factors, in having deposits made for particular purposes; factors by law could not pledge goods deposited in their hands; neither by parity of reasoning could bankers. The only case in which by possibility such a transaction could be justified, would be where the banker was in advance for his customer; there the law gave him a lien upon the bills in his hands, which perhaps might be extended to the right of pledging; but here the balance was in favour of the plaintiff, not of the bankers; he therefore

1796.

COLLINS *against* MARTIN.

therefore relied that *Nightingales* having no property or power to dispose of or pledge the bills, the defendants had by law no title.

EYRE, C. J., asked if the defendants had any notice of transactions or state of the accounts between the plaintiff and the *Nightingales*, or if he by any inference could collect it;—if not, there was an end of the question, as he would not allow it to be discussed in the city of *London*, whether bankers had the power so to dispose of bills paid into their houses, where such transactions were the constant course of business, and the daily practice of the city. There being no evidence of notice, his Lordship ordered the plaintiff to be called.

Shepherd, Serjt., *Hayward*, Serjt., and *Russell*, for the plaintiff.

Le Blanc, Serjt., and *Palmer*, Serjt., for the defendants.

See 1 *Bos.* et *Pull.* 648, nonsuit confirmed.
See *Boston* v. *Puller*, 1 *Bos.* et *Pull.* 639.

END OF MICHAELMAS TERM, 37 GEO. III.

CASES

1797.

ARGUED AND RULED

AT

NISI PRIUS

IN THE

KING'S BENCH,

IN

HILARY TERM, 37 GEO. III.

LAST SITTINGS IN TERM.

HOGAN *against* SHEE.

*[523]

Where money has been paid as a consideration for any thing to be performed or done for the use of the plaintiff, and it appears that the defendant had undertaken what he could not perform, and so had imposed upon the plaintiff, the party may immediately commence an action to recover it back, though it was stipulated to be repaid at a future time, in case of defendant's failing in performance of what he had undertaken.

THIS was an action of *assumpsit* for money had and received.

Plea of *non assumpsit.*

The action was brought to recover a sum of 100*l.* which had been given to the defendant by the plaintiff, as a consideration for the defendant's procuring for his brother the place of a cadet in the service of the *East India* Company, which he had undertaken to do.

* The defendant had given a note, by which he promised to repay that sum within three months, in case he did not procure the place within the time limited.

The

1797. Hogan *against* Shee.

The plaintiff proved this note, and also stated that the interest by which the defendant had represented he could procure the appointment, was that of Sir *Stephen Lushington*, or Mr. *Bosanquet;* the latter of whom was called to prove that the defendant had no manner of interest with him, nor were such appointments to be procured for money.

The plaintiff having discovered the deception, brought his action immediately, without waiting for the three months to be expired.

It was stated by *Erskine*, and assented to by Lord *Kenyon*, that where a contract is to be performed in a given time, and it is *bonâ fide*, no action can be brought until that time is expired; but where it is not *bonâ fide*, as where a party undertakes to do any thing, and on the faith of it another pays a sum of money, and it appears such person cannot perform what he has undertaken within the time specified, so that the taking of the money was fraudulent, the party may consider the agreement as a nullity, and proceed immediately to recover back the money.

The objection to the action was, that it was not maintainable till after the three months were expired.

Lord Kenyon ruled, that it was then maintainable, and said he had so ruled it on other occasions, in the case of goods sold on credit; in which case, if it appeared that there had been
[524] any fraud on the part of the buyer, though the time of credit was not expired, he was of opinion the party might consider the credit as void, and proceed immediately for the recovery of the money.

The plaintiff had a verdict.

Erskine and *Jervis* for the plaintiff.

Garrow for the defendant.

Vide *De Symons* v. *Minchwick*, *ante* 430.

SITTINGS

SITTINGS AFTER TERM AT WESTMINSTER.

ARDEN *against* SHARPE AND GILSON.

Thursday, Feb. 15*th.*

Where one partner puts the name of the firm to a bill of exchange, but the party at whose request it is done, knows that it is not on the partnership account, nor for their benefit, but is the act of the partner only, he cannot sue the firm on that bill.

THIS was an action of *assumpsit* by the plaintiff as indorsee of a bill of exchange, drawn by *R. Cowan* on one *Rae*, at two months after date, in favour of *R. Packer*, for 60*l.* dated the 4th of *March*, 1796.

The case, as proved on the part of the plaintiff, was, that on the first day of *March*, the day on which the bill bore date, *Gilson*, one of the defendants, brought the bill in question to the plaintiff, and requested him to discount it. The plaintiff said he could not do it himself; upon which the defendant *Gilson* answered, he could get it done for him, but wished the business to be kept a secret from his partner Mr. *Sharpe*; to which the plaintiff assented, and took his bill.

*The witness then proved, that the indorsement "*Sharpe* and *Gilson*" was in the hand writing of *Gilson*. *[525]

On this evidence the plaintiff rested his case.

Lord KENYON. This action, under the present proof, cannot be supported; the bill is indorsed by one partner in the name of the firm; one partner certainly may indorse a bill in the partnership name; and if it goes into the world, and gets into the hands of a *bonâ fide* holder, who takes it on the credit of the partnership name, and is ignorant of the circumstances, though in fact the bill was first discounted for that one partner's own use, in such case the partnership is liable; but the case is different where the party who brings the action was himself the person who took the bill with the indorsement by one partner only, and was informed that the transaction was to be concealed from the other: *he* cannot sue the partnership; the transaction indicates that the money was for that partner's own use, and not raised on the partnership account, therefore shall not be allowed to resort to the security of the partnership,

1797.

Arden *against* Sharpe.

to whom in the original transaction he neither looked nor trusted.

The plaintiff was nonsuited.

Garrow and *Manley* for the plaintiff.

Erskine and *Espinasse* for the defendants.

[526]

Dec. 14*th*.

Rex *against* Crossley, Gent.

The book from the master's office, wherein are entered the names of the attornies of the court, is good evidence to prove a party an attorney, without production of the roll.

THIS was an indictment against the defendant for perjury.

In the course of the cause, it became necessary to prove the defendant an attorney of the Court of King's Bench.

A clerk from the master's office was called, who produced a book from the master's office, in which was contained the names of all the attornies of the Court.

Erskine asked him if that was the original, subscribed by attornies on their admission?

He answered, That when an attorney was admitted, and took the oaths, he subscribed a roll which was the original roll of attornies, from whence the names were copied into the book produced.

Erskine objected: that the original roll should be produced.

Lord Kenyon. This book being produced by the officer of the Court, in whose custody it is kept, is sufficient.

Adair, Serjt. *Mills*, and *Russell*, for plaintiff.

Erskine, *Garrow*, and *Manley*, for defendant.

The defendant was convicted, and sentenced to stand on the pillory, and be afterwards transported.

SITTINGS AFTER TERM AT GUILDHALL.

BURDON, Gent. *against* WEBB.

Wednesday, Feb. 15th.

Where an annuity has been made void by reason of a defect in the memorial, and the attorney who prepared the conveyances is sued by the grantee for negligence, and a verdict recovered against him to the amount of the consideration money paid for the annuity, which he pays, he cannot recover it over against the grantor, in an action of assumpsit.

ASSUMPSIT for money paid, laid out, and expended, with the common counts.

Plea of the general issue.

The case was, that one *Webb* had granted an annuity to ——— ; *Burdon* the plaintiff was attorney for the grantee.

A memorial of this annuity not having been properly registered, on application to the Court it had been set aside, and the grantee being at that time dead, his executors brought an action against *Webb* for money had and received, being the consideration paid to him for the annuity; and had a verdict against him.

Webb being then in distressed circumstances, and not paying the money recovered against him, the executors brought an action against *Burdon* for negligence:—before the trial he gave a *cognovit* for the amount of the consideration money paid for the annuity, and afterwards paid it; and this action was brought against *Webb* for the money so paid.

*Per Lord KENYON. It cannot be supported, that a party by his own act and without the consent of another, by paying money for him, can maintain an action on it; if it was so, it would be of the worst consequences, as by that means a man might get his greatest enemy for his creditor: if a surety pays money for his principal, as such was paid by reason of the security, he may maintain an action for it against his principal. I have often ruled that point; but in the present instance the case is very different, the money has been paid by the attorney for his own negligence; and this being in consequence of an action brought against himself, it will not entitle him to maintain an action against the defendant.—The plaintiff must be nonsuited.

*[528]

Wigley for the plaintiff.

Erskine for the defendant.

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Wednesday, Feb. 15th.

ALVES *against* HODGSON.

If an instrument executed abroad, by the laws of that country requires a stamp, the party who holds it cannot recover on it here, unless it is stamped with the stamp of the foreign country.

THIS was an action by the plaintiff, who was a sailor, against the defendant, who was a captain of a *West India* ship, called the *Neill Malcolm*, to recover the amount of wages for the voyage or run from *Jamaica* to *London*.

During the voyage, in consequence of the great scarcity of seamen in the *West Indies*, the wages for the voyage home were considerably advanced, and it was usual with the seaman not to engage for monthly wages, but for a gross sum for the voyage; generally from 40 to 50 guineas.

*[529] *This contract was usually entered into by the captain giving the seaman a promissory note for the amount of the sum he was to receive: these were called notes.

In the present case the defendant engaged the plaintiff, on the 25th day of *July*, at *Savannah le Mar* in *Jamaica*, for the homeward voyage, and gave him the following note:

"Three days after the arrival of the ship *Niell Malcolm* at "her moorings in the river *Thames*, I promise to pay *William* "*Alves* 50 guineas, if he does his duty as an able seaman on "board the said ship.

"*Jamaica, July* 25th, 1796. J. HODGSON."

The plaintiff proved the defendant's hand-writing to the note, and the necessary averments in the declaration which entitled him to recover.

In answer to this note the defendant called a clerk from the office of the Secretary of State, who produced the acts of assembly of the island of *Jamaica*; by one of which a stamp duty of 1*s*. 3*d*. was imposed on every sheet, or piece of paper, wherein was written any promissory note above 20*l*. and not exceeding 50*l*. and so progressively.—The note in question was not stamped; and they therefore contended it could not be given in evidence.

For the defendant it was contended, that this was a mere revenue law of that country, by which the courts of this country were not bound.

[530] Lord KENYON. In deciding on instruments made abroad, I think we are bound to consider the laws of that country where the contract is made; and if they are not obligatory by such laws,

laws, they cannot be enforced here.—By the law of *Jamaica*, given in evidence, the instrument produced would be invalid for want of a stamp. I am therefore of opinion that we cannot give it validity here. However, let the plaintiff take a verdict, with liberty for the defendant to set it aside; and that a nonsuit be entered.

In the next term (*a*) it was accordingly moved by *Mingay*; when the Court agreed with his lordship in opinion; but granted a new trial on another point, upon which the plaintiff ultimately succeeded.

Garrow and *Espinasse* for the plaintiff.

Mingay for the defendant.

(*a*) 7 Term Rep. 241.

DOE ex dem. MILLER *against* NODEN.

Where an ejectment has been brought on the demise of an infant, whichhas been compromised, and the tenant in possession has attorned to the infant; though the lessor of the plaintiff, on his coming of age, does not accept the rent or do any act to confirm the tenancy, yet as the former ejectment was brought at his suit and for his benefit, he shall not be allowed to consider the tenant as a trespasser, and bring a new ejectment without giving notice to quit.

THIS was an action of ejectment, brought to recover possession of certain premises in *Leadenhall-street*.

The lessor of the plaintiff proved a title under one *Ann Hobbs*, as her heir at law, and a fine levied.

*It appeared further in evidence, that subsequent to the levying of the fine, a former ejectment had been brought on the demise of the present lessor of the plaintiff, who was then an infant, against the present defendant for the same premises, when a compromise had taken place and the ejectment settled, by the attorney for the plaintiff taking 100*l.* for the rent in arrear, and the costs, on behalf of the infant; and the defendant agreeing to attorn tenant to him.

At the time of bringing the present ejectment, the lessor of the plaintiff had attained his full age; but there was no evidence of any rent having been paid to him after his coming of age, or of his confirmation of the agreement above stated.

The ejectment was brought without any notice to quit.—This, by the defendant it was contended, was necessary.

For the plaintiff it was contended, that the lessor of the plaintiff having proved a title in himself, and never having done any act confirmatory of the agreement so as to create a tenancy, he

1797. Doe d. Miller against Noden.

was not bound to give any notice to quit; but at liberty to consider the defendant as a trespasser.

On the other hand it was urged for the defendant, that the infant was bound by the agreement so entered into; and the attornment being then made to him, a new tenancy was thereby created, and of course the defendant entitled to notice to quit: and that it would be particularly hard on the defendant, who, on the belief of his term being enlarged and confirmed, had expended a large sum of money in the improvement of the premises.

Lord Kenyon said, he considered the agreement as binding in equity, and capable of being there enforced; and that not-
[532] withstanding the infant was not a party to the agreement, nor had confirmed it, the agreement having been entered into after an ejectment brought at his suit, he was of opinion, he had thereby established the defendant's title, as against himself, and thereby a new tenancy was created, and the defendant could not be considered as a trespasser. A notice to quit not having therefore been given, the plaintiffs should be nonsuited.—His lordship however added, that had there appeared any thing fraudulent in the bringing the first ejectment, or in the agreement entered into under it, he should have ruled that the defendant should have no benefit from it; but as no such thing had appeared, he should nonsuit the plaintiff.

Gibbs and *Reader* for the plaintiff.

Wood and *Shermer* for the defendant.

1797.

IN THE COMMON PLEAS.

SITTINGS AFTER TERM AT WESTMINSTER.

ASTON *against* HEAVEN *et al.*

Tuesday, Feb. 21.

Coach owners are not liable for injuries happening to passengers, from accident or misfortune, where there has been no negligence or default in the driver. Where there is no other carriage on the road, the driver may keep in the middle of the road, and is not bound to keep on the left hand side of the road, even though the accident might have proceeded from the coach not being on the proper side.

CASE against the defendants as proprietors of the *Salisbury* stage-coach, for negligence in the driving of the said coach; in consequence of which the coach was overset, and the plaintiff much bruised and her finger broke.

The plaintiff proved the oversetting of the coach, and the accident having happened from the oversetting of the coach, she being an outside passenger.

The defence relied upon was, that the coach was driving at a regular pace on the *Hammersmith* road, but that on the side was a pump of considerable height, from whence the water was falling into a tub below; that the sun shone bright at the time, and being reflected strongly from the water, the horses had taken fright and ran against the bank at the opposite side, where it was overset.

These facts were made out in evidence; but it also appeared that at the time of the accident, the coach was not driving on the right side of the road, *but on the middle of it; but that in fact there was no other carriage at that time on the road. *[534]

Adair, Serjeant, for the plaintiff contended, that this was no defence to the action. He contended that this was the case of an action against a carrier, and the rule, as the case of goods, applied to the case of the carriage of the person; and that they should be liable in all cases, except where the loss or injury arose from the act of God or of the King's enemies. So that, let the mischief happen under what circumstances it would, except in those two mentioned, the carrier should be liable.

But should it be necessary to prove positive negligence, he relied that there was evidence of it here, it having been proved that the carriage was driving in the middle of the road, whereas had

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ASTON *against* HEAVEN.

had it been driving on the left side, which by law the driver was bound to do, the accident might not have happened, on account of the great distance to that side where the bank was, which caused the accident.—He further relied, that there was some evidence that the coachman* was then driving with loose reins.

EYRE, Chief Justice. This action is founded entirely in negligence. It has been said by the counsel for the plaintiff, that wherever a case happens, even where there has been no negligence, he would take the opinion of the Court, whether defendants circumstanced as the present, that is, coach-owners, should be liable in all cases, except where the injury happens from the act of God or of the King's enemies. I am of opinion the cases of the loss of goods by carriers and the present are
[535] totally unlike.—When that case does occur, he will be told that carriers of goods are liable by the custom to guard against frauds they might be tempted to commit by taking goods entrusted to them to carry, and then pretending they had lost or been robbed of them; and because they can protect themselves; but there is no such rule in the case of the carriage of the persons.—This action stands on the ground of negligence alone.

It appears by the evidence, that a person was on the roof: that undoubtedly alters the centre of gravity, and makes the carriage more liable to overset; and if the construction of the carriage was such, that by putting a person on the roof it renders it unsafe, I think in such case the owners would be liable;—but that is not to be presumed to be so, without evidence.

It has been relied that the coach was on the wrong side of the road; but it is also in evidence that there was no other carriage at that time on the road. In such case I am of opinion that nothing is imputable to the driver: when there was no other carriage to interrupt him, he had a right to go on what part of the road he thought fit.

The immediate cause of the accident is agreed on all hands; the question therefore depends on the consideration of Whether there was any negligence in the driver? It is said he was driving with reins so loose, that he could not readily command his horses: if that was the case, the defendants are liable; for a driver is answerable for the smallest negligence. But if this does not appear, and the accident appears to have arisen from
[536] any unforeseen accident or misfortune, as from the horses suddenly taking fright; in such case the defendants are not liable.—

It

It is for the jury to say, whether it proceeded from that cause or not.

The jury found a verdict for the defendants.

Adair, Serjt., *Marshall*, Serjt., and *Lawes*, for the plaintiff.

Le Blanc, Serjt., and *Bailey*, for the defendants.

BAPTISTE *against* COBBOLD.

Tuesday, Feb. 21.

When a declaration is on a contract stated specially, it must set out the whole; but when it is on an agreement, and the contract is only given in evidence of the agreement, the party may forego part, and declare for the residue.—Where a contract has been entered into, if any thing is added to it afterwards, it does not so far make part of the original contract, as to make it necessary to include it in a declaration on the original contract.

THIS was an action on the case brought by the plaintiff, who was a sailor, to recover from the defendant a sum of 50 guineas, as his wages from *Jamaica* to *London*.

The declaration stated, that in consideration that the plaintiff would enter himself as a mariner in and on board a ship or vessel called *The Duke of Clarence*, of which the defendant was master, and do his duty as an able seaman in such ship during her said voyage, that he would pay him a sum of 50 guineas: and then assigned a breach.

To prove this contract, the plaintiff produced a note given by the defendant to the plaintiff in the form of a promissory note, by which the defendant promised to pay the plaintiff the sum of 50 guineas; *and to give him half a pint of rum* per day, in consideration of his serving as a seaman, &c.; *but the words "to give him half a pint of rum per day," appeared not to have been written at the same time with the first agreement.

Cockell, Serjt., objected: that this went to nonsuit the plaintiff.—He contended that the note produced contained an entire contract, *viz.* the payment of the money and delivery of the rum, in consideration of the plaintiff's services, and should therefore have been so declared upon, as otherwise the plaintiff might maintain two actions on the same contract, one for the money, and the other for the rum, which the law would not allow.

* [537]

EYRE, Chief Justice, said, he thought the objections would not hold. If the declaration was on the contract stated specially, there would be a variance, because a contract when so declared upon is entire: but when the declaration is on an agreement, as it was in this case, and the note was offered only in evidence of the agreement, the party might forego part, and go for the remainder only.

 But

1797.

Baptiste *against* Cobbold.

But at all events, this did not appear to be an entire contract; for the words respecting the rum did not appear to have made part of the original contract, but to have been added at a subsequent time; in which case it was not necessary to include them in the declaration on the original contract.

The plaintiff had a verdict.

Shepherd, Serjt., and *Reader*, for the plaintiff.

Cockell, Serjt., and *Barrow*, for the defendant.

In the next term the defendant moved to set aside the verdict, and obtained a rule to shew cause. But the Court of C. P. discharged it. Vide *Bosanquet* and *Puller's Reports in C. P.* 7. *S. P. Bristow* v. *Wright*, 2 *Dougl.* 665.

SITTINGS AFTER TERM AT GUILDHALL.

[538]

Wyatt *against* Bulmer.

Although the consideration of a bill of exchange in its creation may have been illegal, yet that does not entitle the acceptor (except in the cases of usury and gaming) to call upon a remote indorser to prove the consideration on which he had it, unless he can be implicated in the original transaction, and be proved to have been privy to it.

ASSUMPSIT on a bill of exchange against the defendant as the acceptor.

The bill was drawn by one *Dolphin*, in his own favour, for 40*l.* on the defendant; which he accepted. It was indorsed by *Dolphin* to *Stratford*, and by *Stratford* to the plaintiff.

The plaintiff proved the several hand-writings of the parties on the bill, and there rested his case.

The defendant gave in evidence that *Dolphin* had kept an illegal lottery-office for insurance, and that the bill in question had been accepted by *Bulmer* the defendant, on account of losses in the course of such illegal insurances in the lottery; but the evidence did not go so far as to establish any knowledge in the plaintiff of the original transaction, or of the consideration of the bill.

Upon this evidence, however, as given, *Le Blanc*, Serjeant, for the defendant contended, that having impeached the original transaction, it gave him a title to call upon the plaintiff to prove the consideration given by him for the bill.

Eyre

EYRE, Chief Justice, said, he did not carry the rule so far as stated by the defendant's counsel: and that he held the circumstance of the original transaction being contrary to law (provided the security was not declared to be void by law) did not, where the action was by a remote indorsee, necessarily call upon him to prove the consideration. The indorsement was of itself *primâ facie* evidence of a good consideration; and if the defendant meant to call upon the holder to prove the consideration, it would be necessary to implicate *him* some way in the transaction, or to shew some degree of privity or knowledge respecting it.

If therefore this case stood on the circumstance only, of its having been given on account of illegal insurance in the lottery, he should have thought it insufficient to give the defendant a right to call on the plaintiff to shew the consideration: but there was a farther circumstance in this case, which was, that the bill was drawn in the year 1793: he was of opinion, that, coupled with other circumstances, did make it necessary for the plaintiff to give evidence of the consideration.

The plaintiff gave evidence to that effect, and had a verdict to the amount of the bill.

Shepherd, Serjt., and *Onslow*, for the plaintiff.

Le Blanc, Serjt., for the defendant.

In the case of NEWBY *v.* SMITH, before Lord KENYON, Sittings before *Michaelmas* Term 1788, which was an action by the indorsee of a promissory note against the maker, his Lordship ruled, that the defendant should not be allowed to go into evidence to shew the original consideration of the note illegal, unless he could likewise shew the holder (the plaintiff indorsee) a party to that illegality;—except in the cases of gaming and usury, where by statute the securities are declared to be to all intents and purposes void. Vid. 1 T. Rep. 40. 2 T. Rep. 72.

1797.

Coupey *against* Henley, Whale, and Webster.

A constable is not justified in taking a person into custody for a mere assault, unless he is present at the time, and interposes with a view to prevent a breach of the peace: but if an affray has happened, and a wound has been given, which there is reasonable ground to suppose may end in a felony, the constable may take the party who has given such wound into custody without a warrant.

THIS was an action of assault and false imprisonment.

The case on the part of the plaintiff was, that the defendant *Whale*, (who had worked with the plaintiff, who was a sawyer,) having come to demand some wages which the plaintiff thought him not entitled to, and being extremely insolent, a scuffle had taken place, and the plaintiff threw him down and hurt him.

Some time after which *Henley* and *Webster*, as constables, had come to the plaintiff's house and violently taken him into custody, without any warrant or other authority, and kept him till a friend had come forward and become answerable for his appearance.

The defence was, that *Whale* had received a blow in the scuffle from the plaintiff, and a fall in consequence of it; it was supposed he had received a wound which might have been fatal, and that the defendants *Henley* and *Webster*, as constables, were warranted by law to take the party into custody.

The constables were not present when the affray happened, but were sent for; and, on the representation made to them, took the plaintiff into* custody; which the plaintiff's counsel contended by law they could not do.

*[541]

Eyre, Chief Justice. There is no doubt that by law a constable is not warranted to take a person into custody for a mere assault, unless he is present at the time, and interposes with a view to prevent a breach of the peace. But I should hold, that if an affray has happened, and a blow or wound has been received likely to end in a felony, that will authorize the constable to take the party into custody without any warrant; but in such case it should appear *that there was ground and foundation for such a supposition* that a felony was likely to ensue: for, as on the one hand, by forbidding a constable to take a person into custody without a warrant, where death was likely to ensue in consequence of a blow given, a murderer might escape; so by allowing the ill-grounded or malicious suggestions of the constable, or any other person who might give him information, to justify a constable to take a person into

into custody, great injury might be done to individuals. The ground ought therefore to appear sufficient and satisfactory, such as may afford reasonable ground to the constable to believe a felony would probably ensue; for if the grounds are frivolous, or such as it appears he himself hardly credited, he will be liable to an action of false imprisonment if he proceeds in the arrest.

In the present case I think there was not such an assault or blow given as could justify the imprisonment; for the act of the constable himself shews, that he did not consider it in the light of an injury likely to be attended with serious consequences, or from whence a felony was likely to ensue; for he [542] consented to enlarge the plaintiff on a person's becoming bound for his appearance; which, had he apprehended a felony, he would not have done.—The plaintiff must have a verdict.

Shepherd, Serjt., and *Espinasse*, for the plaintiff.

Le Blanc and *Knowlys* for the defendant.

Alcock *v.* Andrews, Sittings after *Michaelmas* Term, 1788.

This was an action of assault and false imprisonment against the defendant, who justified as a constable.

Law for the defendant objected: that the plaintiff had not shewn the action commenced within six months, according to the statute 24 *Geo.* 2. *c.* 44. § 8.

Lord Kenyon over-ruled the objection on this distinction, That the defendant acted *colore officii*, and not *virtute officii;* and said, that it had often been held that a constable acting *colore officii* was not protected by the statute; where the act committed is of such a nature that the office gives him no authority to do it, in the doing of that act he is not to be considered as an officer: but where a man doing an act within the limits of his official authority, exercises that authority improperly, or abuses the discretion placed in him, to such cases the statute extends.—The distinction is between the extent and the abuse of the authority.

END OF HILARY TERM, 37 GEO. III.

1797.

LENT ASSIZES

AT CHELMSFORD.

CORAM HEATH, JUSTICE.

FITCH *against* FITCH.

Under a claim of right by a custom for all the *inhabitants* of a parish, evidence that a party claiming such right rented a tenement within the parish, which he used occasionally, though he did not actually *reside* within the parish, will support the custom.—Where a party claims a right to use a piece of ground belonging to another for a lawful purpose, he must use it for such purpose in a lawful and proper way, otherwise he will be considered a trespasser.

TRESPASS for breaking and entering the plaintiff's close at *Steeple Bumstead* in *Essex*.

The defendant justified, that all the inhabitants, &c. of the parish of *Steeple Bumstead*, had by custom a right to play at all times of the year, at all kinds of lawful games and pastimes in the said close. He then averred that he was an inhabitant; and that the trespass was committed in the exercise of a lawful pastime, &c. *prout ei bene licuit.*

There was a new assignment (*a*) "of unnecessary and excessive damage,"—and Not Guilty pleaded.

The evidence as to the inhabitancy was, that the defendant's father lived in an adjoining parish, but that he rented a butcher's shop in the parish of *Steeple Bumstead*, where he and the defendant came regularly twice a week, for the purpose of selling their meat.

It was contended by the plaintiff's counsel, that this was not such an inhabitancy as could justify the defendant under the title of an inhabitant within the custom, which should be confined to those only who dwelt within the parish.

*Mr. Justice *Heath* ruled that it was.—His Lordship said, it was like the case, where by custom a right was claimed of dipping at a well; in which case, a defendant, circumstanced as the present, could be justified in going there.—So of a seat in the parish church.

*[544]

(*a*) Vid. 8 Term Rep.

Upon

Upon the issue on the new assignment, the excessive and unnecessary injury, the evidence was, that the *locus in quo*, which was the soil and freehold of the plaintiff, having been let to run to grass, which the plaintiff had mowed, the defendants had gone into it, trampled down the grass, thrown the hay about, and mixed gravel through it, so as to render it of no value.

The counsel for the defendant contended, that if the right was established for the inhabitants to play at any games in the close, the defendants were justified in removal of any obstruction to the free exercise to the enjoyment of the right they claimed; and so were justified in throwing the hay about in the manner stated.

HEATH, Justice. The custom appears to be established.—The inhabitants have a right to take their amusement in a lawful way. It is supposed, that because they have such a right, the plaintiff should not allow the grass to grow. There is no foundation in law for such a position. The rights of both parties are distinct, and may exist together. If the inhabitants come in an unlawful way, or not fairly, to exercise the right they claim of amusing themselves, or to use it in an improper way, they are not justified under the custom pleaded, which is a right to come into the close to use it in the exercise of any [545] lawful games or pastimes, and are thereby trespassers. His Lordship therefore left it to the jury to say, Whether the defendant had entered the close in the fair exercise of a right, or in an improper way.

The jury found for the plaintiff, that it was used in an improper way.

Shepherd, Serjt., *Garrow*, and *Marryat*, for the plaintiff.

Palmer, Serjt., and *Lawes*, for the defendant.

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CASES

ARGUED AND RULED

AT

NISI PRIUS

IN THE

KING'S BENCH

IN

EASTER TERM, 37 GEORGE III.

SECOND SITTINGS IN TERM AT GUILDHALL.

Wednesday, May 15th.

MARRIOTT, Gent. *against* HAMPTON,

Where a party is sued on a claim, and at the time he is sued is in possession of evidence which would defeat that claim, but does not avail himself of it, and pays the money so claimed, he shall not afterwards be allowed to recover it back in another action.

THIS was an action for money had and received; and was brought to recover back a sum of money which the plaintiff had paid to the defendant under the following circumstances.

The plaintiff (who was an attorney) had employed the defendant in the year 1792, as his stationer, and had become indebted to him to the amount of 7*l*. Soon after the plaintiff left the kingdom, and on his return the defendant had been under the necessity of suing him: after that action *had been proceeded in for some time, the present plaintiff settled the cause by paying the debt and giving a *cognovit* for the costs; this was done in the beginning of *Michaelmas* Term 1796, with a stay of execution till the 23d of *November*.

*[547]

The

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MARRIOTT *against* HAMPTON.

The costs not having been paid pursuant to the *cognovit*, the present defendant signed judgment, and was proceeding to execution, when the present plaintiff set up a receipt as having been given by the present defendant, prior to the bringing of his action against the present plaintiff, and which was a receipt dated the 25th of *November*, 1792, in full of all demands.

The present defendant insisting it was a forgery, and refusing to allow the money so paid, the plaintiff paid the whole; and the present action was brought to recover it back.

Lord KENYON, on the case being opened, asked *Gibbs* (of counsel for the plaintiff) whether he thought the action maintainable.

Gibbs contended that it was within the case of *Moses* v. *M'Farlane*, 2 *Burr.* 1005.; where the plaintiff having been ordered to pay a sum of money by an inferior court, was allowed to recover it back *in assumpsit*.

For the defendant was relied the case of *Brown* v. *M'Kinally*, *Espin. N. P. Cas. Hil.* 35 *Geo.* 3. p. 277, where Lord *Kenyon* had ruled, that where a party sued on a claim which he knows to be unfounded, pays it voluntarily and with notice, the money so paid cannot be recovered back in *assumpsit*.

Lord KENYON said, that the case of *Moses* v. *M'Farlane* had gone far enough; but that it was clearly distinguishable from the present. In that case the plaintiff had been allowed to recover back money adjudged to the defendant in the Court of Conscience, not on the footing of the merits, but that from the nature of the jurisdiction of the Court below, the plaintiff could not avail himself of a legal defence: but in this case the present plaintiff, at the time the former action was brought, must have been possessed of that instrument upon which he now grounded his claims, and on which, had he relied, the present defendant could not have recovered against him. His Lordship added, if after an action has been brought, and the plaintiff has recovered, the defendant on grounds like the present was to be allowed to commence an action to review a cause already tried, every cause would be tried twice; "*interest reipublicæ ut sit finis litium.*" Proceedings at law are sufficiently expensive; this would be to add to them infinitely; the inconvenience would be immense. The plaintiff must be called. [548]

Gibbs and *Reader* for the plaintiff.

Garrow,

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MARRIOTT *against* HAMPTON.

Garrow and *Espinasse* for the defendant.

Within the next four days (a) *Gibbs* moved for a new trial, and cited a case of *Livesey* v. *Rider*, *Easter*, 22 *Geo.* 3. where, on a similar motion, he stated, the Court had held such an action maintainable.—But the Court concurred in opinion with his Lordship, and refused the rule.

Vide *Knibbs* v. *Hall*, Vol. I. 84.

(a) Vid. 7 Term Rep. 269.

[549] SITTINGS AFTER TERM AT WESTMINSTER.

Tuesday, May 30th.

MOLTON q. t. *against* HARRIS.

The memorial of a conveyance that has been registered, is not evidence of the contents of such conveyance, unless notice has been given to the opposite party to produce the conveyance.

THIS was an action of debt, brought to recover two penalties given by statute 5 *Ann. c.* 14, for killing game; not being qualified.

The defendant pleaded the general issue, and relied that he was qualified by estate to kill game.

To prove this qualification, he gave in evidence the payment of rents by several persons who held houses under him to the extent of the qualification; but all of them appeared to have first become tenants to him from *Michaelmas* 1796; the title under which he claimed this property was (as appeared by the receipts made) a conveyance from a Mr. *Fellowes*, whose niece he had married in the *March* preceding.

The counsel for the plaintiff contended, that the conveyance was fraudulent, and done with a view to give him a fictitious qualification to kill game; and that it would appear so by the deed of settlement made on defendant's marriage.

To prove the circumstance they called Mr. *Walford*, who was attorney to the defendant; but not being able to get the fact from him, *Garrow* proposed to give in evidence the memorial
[550] of the conveyance as registered; and contended, that as the deed was in the hands of the defendant, such inferior evidence would be sufficient.

Lord

Lord Kenyon asked if notice to produce it had been given; and on being answered in the negative, ruled, that no notice having been given to produce the deed, no proof whatever of its contents was admissible by any other evidence.

The plaintiff was nonsuited.

Garrow and *Park* for the plaintiff.

Erskine and *Mingay* for the defendant.

Boulager *against* Talleyrand.

Tuesday, May 30th.

It is not necessary to set out the protest of an inland bill of exchange, unless the party goes for interest and costs; but if it is set out, it must be proved.

THIS was an action of *assumpsit* on an inland bill of exchange drawn by the defendant on one *Staples*, in favour of the plaintiff.

The plaintiff proved the hand-writing of the defendant, and non-payment by *Staples;* and there rested his case.

Park for the defendant insisted, that the plaintiff having laid in his declaration, that the bill was protested and notice given, was bound to prove it.

It was answered, that although it was settled that in the case of a foreign bill of exchange protest must be set out and proved, it was otherwise in the present case, the bill on which the action was founded being an inland one; and *Gale* v. *Walsh*, 5 *T. R.* 239, was cited in support of the former position; from whence it was inferred it was not necessary in the case of an inland bill, and so being not of substance, need not be proved.

[551]

Lord Kenyon said, that protests in the case of inland bills of exchange were of substance, inasmuch as, under the several statutes by which they were given, they were necessary, in order to entitle the holder to interest and costs; and he was therefore of opinion, that though the want of the protest only affected the interest and costs, and not the note itself, the plaintiff having set out a protest and notice, which involved in it the consequential claim of interest and costs, was bound to prove them, although it was not necessary to set it out in the case of an inland bill of exchange, except for the consequences it involved.

It afterwards appeared, that in fact a protest had been made, which

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BOULAGER against TALLEYRAND.

which was given in evidence (*a*); and to dispense with the necessity of notice, the plaintiff called *Staples* the drawee, to prove that he had no effects of the drawer's in his hands.

The plaintiff recovered.

Erskine and *M'Intosh* for the plaintiff.

Park for the defendant.

Vide *Borough* v. *Perkins*, 1 *Salk.* 130. *Harris* v. *Benson*, 1 *Str.* 910, stat. 9 and 10 *W.* 3. *c.* 17; and 3 & 4 *Ann. c.* 9.

(*a*) Bailey on Bills, 111.

Thursday, June 1st.

WARD *against* HAYDON and VENTOM.

Where one defendant in a joint action has let judgment go by default, and the other has pleaded, the defendant who has suffered judgment by default is a good witness for the other defendant who has pleaded.—The mere act of making an inventory or drawing a notice, &c. is not such an intermeddling as will subject a party to an action.

THIS was an action of trover for the carriage-part of a chaise.

Haydon, one of the defendants, let judgment go by default; and *Ventom*, the other defendant, pleaded the general issue.

The case on the part of the plaintiff was, that he had sent the carriage in question to the yard of one *Pyall*, a coach-maker, to be repaired; *Pyall* had been indebted to *Haydon*'s mother for rent, and he by her direction had made a distress on the premises, and *Ventom* was the broker.

The plaintiff relied on the law, that the carriage was not distrainable, being in the yard of the coach-maker, and proved a demand and refusal.

The defence was, that the distress was taken by *Haydon* only, and that *Ventom* merely assisted as a broker in making the inventory, but never had the possession or disposal of the carriage, which had always remained in the possession of *Haydon*; and that his answer, when applied to by the plaintiff, was a mere disclaimer of any power over it, and referring him to *Haydon*.

To prove these facts, the counsel for the defendant *Ventom* proposed to call *Haydon*, the other defendant.

Erskine objected: that *Haydon* was not an admissible witness; he contended that there could be but one assessment of damages; that either of the defendants might be called upon
[553] for the payment of the whole sum to be recovered, and the costs of the issue as well as those incurred on the assessment of damages;

damages; *Haydon* therefore would be liable to the costs in case of a verdict against *Ventom*, which he would save if by his evidence he could procure a verdict for *Ventom*.

Lord KENYON said, that when the point was first opened, he rather thought *Haydon* was an incompetent witness; but on further consideration, he did not see how he was interested in the question, as he thought *Haydon* was not bound to pay the costs of the issue tried against *Ventom* the other defendant.

His Lordship added, Suppose one defendant thinks fit to plead several long special pleas, and make a long record, and has a verdict against him, can defendants who have suffered judgment by default be called upon to pay all the costs? I have some doubts on the point, but yet I think such defendants would not be liable; at all events, if a verdict went in favour of the defendant who had pleaded, the plaintiff would not be liable to the costs of him who has suffered judgment by default; and his Lordship cited a case from *Barnes* to that effect; and therefore held *Haydon* to be an admissible witness, who was accordingly produced, and proved defendant's case.

In summing up, his Lordship told the jury, that in order to charge the defendant *Ventom* in this action, it would be necessary to prove that he had taken some part respecting the goods, or interfered with the disposition of them; but that the mere act of making an inventory by direction of the other defendant, [554] and drawing a notice which the other signed, was not sufficient to subject him to this action.

The defendant *Ventom* had a verdict.

Erskine and *Espinasse* for the plaintiff.

Gibbs for the defendant.

WALFORD *against* Duchess de PIENNE.

Wednesday, June 7th.

Where the husband of a married woman, a foreigner, has gone abroad, but declared his intention of returning in a short time, but has not done so, the wife is liable for debts contracted in the husband's absence.

THIS was on action of *assumpsit* for goods sold and delivered.

Plea, that the defendant was covert of the Duke de *Pienne*.

The

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WALFORD *against* PIENNE.

The evidence in support of this plea, established the fact of the marriage, and further, that the Duke, who was a foreigner, had gone abroad in the year 1793, and had not since returned; during that interval the Duchess had kept house, and paid bills for goods furnished on her own account, and in her own name; but the witness who proved those facts said, that the Duke on his going abroad had proposed to remain abroad only for four months, and as the witness believed, had not abandoned his intention of returning to this country, though he had not as yet done so.

Upon this evidence Lord KENYON ruled, that the defendant was liable. His Lordship said, the present case came within the principle of the old common law, where the husband had abjured the realm.—If the husband had been absent for some time, and then returned and paid bills contracted by the wife [555] in his absence, and again left the kingdom, he should hold the wife not liable: but here was a desertion of the kingdom, and an absence of some years; he was no longer domiciled here, and in the interval his wife was supplied with those articles; if she was not to be held liable for debts contracted under such circumstances, she might be starved.—His Lordship added that some modern cases had, in his opinion, gone too far.

The plaintiff had a verdict.

Garrow and *Gaselee* for the plaintiff.

Erskine for the defendant.

Post, 587.

SITTINGS AFTER TERM AT GUILDHALL.

June 15th.

HAMSON Assignee of PINGO, *against* HARRISON

A clerk in the Custom-house, who receives debentures or securities for merchants, for which he receives the money, and has a commission on such receipts, and employs the money he so receives in discounting bills or notes for his own benefit, is not a scrivener within the meaning of the bankrupt laws.

THIS was an action of *assumpsit* by the plaintiff, as the assignee of *Pingo*, a bankrupt.

The defendant admitted the petitioning creditor's debt and the act of bankruptcy, but denied that the bankrupt was a trader

within

within the meaning of the bankrupt laws.—The evidence of the trading was, that *Pingo* was a clerk in the Custom-house; that he frequently took debentures for merchants, and received the *money for them, which he kept in his possession; that he had a commission on the receipt of the money; and that with the money so received he discounted bills of exchange or notes for his own benefit. *[556]

The plaintiff's counsel contended, that this made him a scrivener within the bankrupt laws, and so liable to be made a bankrupt.

Lord KENYON. It is impossible to suppose, that every man who receives the money of others into his possession, and makes some kind of use of it, thereby becomes a scrivener: such a doctrine would subject parties to the bankrupt laws, to whom the law never intended them to extend; it would extend to the stewards and receivers of landed property; in fact to every person in business. When the statute passed, the business of a scrivener was well understood; the statute had those particular persons in view, persons who *eo nomine* carried on the business of scriveners. The acts relied on to constitute a scrivener must apply to persons who used to act as they did; not where a person receives and pays money as the bankrupt in the present case has done. I am therefore of opinion, that the supposed trading set up in this case is not a trading within the meaning of the bankrupt laws, and that the

Plaintiff must be nonsuited.

Erskine and *Onslow* for the plaintiff.

Law and *Giles* for the defendant.

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GEORGE *against* CLAGGETT and PRATT.

Where a factor sells goods as a principal, and the buyer has no notice of the seller's being only a factor, the factor shall be considered as to him a principal; and it is a good answer to an action brought by the real principal, that the factor is indebted to the buyer of the goods, and that he holds them for such debt.

ASSUMPSIT for goods sold and delivered.

Plea of non-assumpsit and set-off.

This action was brought by the plaintiff, who was a clothier at *Frome*, in *Somersetshire*, to recover from the defendants a sum of 142*l.* being the value of a quantity of woollen goods belonging to the plaintiff, which had been sold to the defendants,

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GEORGE *against* CLAGGETT.

fendants, by Messrs. *Rich* and *Heapy*, who were his factors.—The plaintiff claimed a right, as principal, to recover the price in the hands of the buyer, the money not having been actually paid over to the factors before the bringing of the present action.

This right was denied under the following circumstances:—*Rich* and *Heapy* were the factors of the plaintiff, with a *del credere* commission: but they also dealt largely, and sold goods on their own account; the goods which they sold as factors, and on their own account, were sold indiscriminately; and the usual credit was 12 months.

In the latter end of the month of *September* 1795, one *Delvalle*, who was a tobacco broker, bought a quantity of tobacco from the defendants; for which he paid them with an acceptance of *Rich* and *Heapy*, of which *Delvalle* was the indorsee.

The defendants being possessed of this bill, bought a large
[558] quantity of woollen goods from *Rich* and *Heapy* on the 12th of *October* 1795, to the amount of 1200*l.* at 12 months' credit.

Part of these goods had been consignments from the plaintiff to *Rich* and *Heapy* as his factors; but they and the other goods were delivered without any distinction by *Rich* and *Heapy*; the bill of parcels was made out in their names; neither did the defendants know that any part of the goods were the plaintiff's.

In *November* of the same year *Rich* and *Heapy* became bankrupts. The time of credit not being then expired, nor the goods paid for, the plaintiff gave notice to the defendants that the goods were his, and claimed the price of them; his counsel relying at the trial on the case of *Estcott* v. *Milward*, *Co. B. L.* 236. as establishing that he had by law a right so to do, and was entitled to the amount of them in the hands of a purchaser.

On the other side it was contended, that the defendants had dealt with *Rich* and *Heapy* as principals; the bill of parcels was in their names, nor was it possible that they could know any thing of the plaintiff; that they therefore had a right to consider *Rich* and *Heapy* as their debtors, and to set off against that debt the bill of exchange of which they were holders, and of which *Rich* and *Heapy* were the acceptors.

Lord KENYON ruled that the defendants were entitled to hold the goods: that the defendants having dealt with *Rich* and

Heapy as principals, should not be turned round by the plaintiff's setting up himself as principal, and considering them only as his factors: that he had in a case* before him adopted a similar principle, founded on a determination of Lord *Mansfield*—*viz*. That where a factor deals for a principal, but which principal does not appear, and the factor delivers the goods in his own name, if the person dealing with the factor on his own account has any demand against the factor, he has a right to consider the factor as the principal, and to set off any demand he may have against the factor, against the value of the goods so sold; and that such would be a good answer to any action brought by the principal for the price of the goods.

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GEORGE *against* CLAGGETT.

*[559]

His Lordship therefore ruled, that the defendant was entitled to a verdict; which was so found by the jury.

Erskine, *Garrow*, and *W. Walton* for the plaintiff.

Gibbs and *Giles* for the defendants.

In the next term (*a*) a new trial was moved for on the part of the plaintiff: the Court of King's Bench were of opinion that the law was as delivered by the Lord Chief Justice, and discharged the rule.

(*a*) S. C. 7 Term Rep. 359. 2 Str. 1192, *Skrimshire* v. *Alderton*.

END OF EASTER TERM, IN THE KING'S BENCH.

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IN THE COMMON PLEAS.

SITTINGS AFTER TERM.

June 13th.

HAMPTON *against* JARRATT.

Where there have been mutual dealings between parties, and money paid on account, if the party who has so paid the money insists that it was an overpayment, and means so to set it off, he must make it the object of a special notice of set-off.

THIS was an action for goods sold and delivered.

The defendant pleaded the general issue, with notice of set-off.

The set-off was in the common form (*a*), "that the plaintiff was indebted to him in a larger sum than that claimed by the plaintiff, to wit, in 100*l.* for money had and received, 100*l.* for goods sold and delivered," going through the common counts of the declaration.

That part of the defendant's case upon which he meant to rely in support of his set-off his counsel proposed to make out in the following manner. The defendant had for a considerable time before dealt with the plaintiff, and had paid him several bills for articles furnished by the plaintiff, in the course of his trade to the defendant. These bills the defendant now pretended to have been over-charged, and liable to very considerable deduction; and these overpayments he proposed to prove, and to set off against the demand claimed by the plaintiff in the present action.

This was opposed by the plaintiff's counsel, on the ground that the accounts upon which these payments had been made
[561] having been settled, the accounts could not now be opened; but that if they could, it should have been made the object of a special set-off, and could not be claimed under the general notice.

It was answered by the defendant's counsel, that this was money paid by mistake, and would have been recoverable under

(*a*) Vid. post, 569, *Ord* v. *Ruspini.*

the

1797. — HAMPTON *against* JARRATT.

the general money-counts; and so, under a similar clause in the notice of set-off, could be given in evidence as money had and received to the party's use.

EYRE, C. J. said, he was of opinion that it could not be given in evidence under the common notice of set-off. It was taking the plaintiff by surprise; and if the defendant meant to have availed himself of it, it should have been the object of particular notice.

His Lordship therefore rejected it, and the plaintiff recovered.

Cockell, Serjt. and *Espinasse* for the plaintiff.

Shepherd, Serjt. for the defendant.

END OF EASTER TERM, 37 GEO. III.

1797.

CASES

ARGUED AND RULED

AT

NISI PRIUS

IN THE

KING'S BENCH,

IN

TRINITY TERM, 37 GEO. III.

SECOND SITTINGS IN TERM.

Saturday, June 24.

Elsam *against* Faucett.

In an action for crim. con. evidence of misconduct in the woman subsequent to her connexion with the defendant, is not admissible.—A letter written by the woman previous to connexion with the defendant, is admissible in mitigation of damages. *Qu.* et vide *Baker* v. *Morley*, Bull. N. P. 28.

THIS was an action for criminal conversation with the plaintiff's wife.

Plea, Not Guilty.

The defendant relied on the general ill conduct of the plaintiff's wife; that she was in the practice of walking the streets as a common prostitute, under which circumstances her first connexion with the defendant began, and that she had afterwards gone on the town.

The plaintiff's witnesses proved the case.—*Gibbs* for the defendant was proceeding to cross-examine into the fact of Whether, after her elopement* from her husband's house, she had not gone into lodgings, and conducted herself as a prostitute?

Garrow objected to this examination.

*[563]

Per

Per Lord KENYON. The question cannot be asked: evidence of loose conduct or criminality with others, as having eloped, for example, before the commission of the fact complained of by the present action, may be admissible in mitigation of damages; but acts of subsequent misconduct cannot.

To prove that the plaintiff's wife had not been seduced by the defendant, but that she had solicited him, and enticed him into the connection,

Gibbs proposed to read a letter written by her to the defendant.

This was objected to.

Lord KENYON was of opinion, that the letter having been written before the time when the criminal facts of the case had been proved to have been committed, was admissible.

The plaintiff had a verdict.

Erskine, *Garrow*, and ——— for the plaintiff.

Gibbs and *Kidd* for the defendant.

LAST SITTINGS IN TERM.

LOYD, EXECUTRIX, *against* FINLAYSON.

Monday, July 3.

In an action by an executor, he cannot be called upon to shew that the testator is dead, unless there is a plea of *ne unques executor.*

TROVER for a quantity of wearing apparel.
Plea of Not Guilty.

The goods in question had belonged to a sailor of the name of *Forester*, and on his going a voyage, had been left by him in the care of the defendant, with directions to keep them till he was paid a demand due to him by *Forester*.—The defendant therefore claimed to retain them under this right.

It was stated that *Forester* had died at *Naples*; and the plaintiff, with whom he had left his will and power, had proved the will; after which she demanded the clothes; which being refused, the present action was brought.

The admission of the defendant, that he had the goods, was proved, and a demand and refusal; and there the plaintiff rested his case.

Garrow

1797.

LOYD *against* FINLAYSON.

Garrow for the defendant objected: that the plaintiff having declared as executrix, she ought to prove that the testator was dead, and so that she was complete executrix.

Erskine for the plaintiff answered, that as there was no plea of *ne unques executor* on the record, it was unnecessary.

[565] Lord KENYON ruled, that as the only plea in the record was on the merits, which were thereby put only in issue, the defendant had admitted the plaintiff's right to sue, so that the production of the probate of the will was under such circumstances sufficient evidence, as well of the death of the testator as of the plaintiff's right to support the action.

The cause was afterwards referred.

Erskine and *Marryatt* for the plaintiff.

Garrow for the defendant.

SITTINGS AFTER TERM AT WESTMINSTER.

WALSH *against* WHITCOMB.

Where a power of attorney is given as part of a security, it is not revocable.

THIS was an action of *assumpsit* for work and labour, goods sold and delivered, with the common counts.

Plea of *non-assumpsit*.

The action was brought to recover a sum of money for work done by the plaintiff, who was a tailor.

The defence was, that *Walsh* the plaintiff, in the month of *October* 1794, having become insolvent, had executed a power of attorney to one *Barker*, together with a general assignment by deed, authorizing him to receive the several debts due to him for the benefit of his creditors, and to give proper receipts and discharges for the same: and that he had also given *Barker* a power to appoint a substitute or other person to act in his room for the same purposes.

In *October* 1795, *Barker*, in pursuance of the power of substitution so given, executed an authority to one *Charles Hindley*.

Hindley applied to the defendant *Whitcomb* for the debt due to *Walsh*; he paid it and took his receipt.

Some

Some time after, *Whitcomb* was again applied to for payment of the same demand, by another person claiming under a power of attorney from *Walsh* the plaintiff. The defendant *Whitcomb* produced the receipt he had received from *Hindley*, which the person who applied refused to allow; and the present action was brought.

For the plaintiff it was contended, that a power of attorney is, from its nature, revocable, and that the execution of the subsequent power of attorney was a revocation of the former.

Per Lord KENYON. There is a difference in cases of powers of attorney: in general they are revocable from their nature; but there are these exceptions. Where a power of attorney is part of a security for money, there it is not revocable: where a power of attorney was made to levy fine, as part of a security, it was held not to be revocable; the principle is applicable to every case where a power of attorney is necessary to effectuate any security; such is not revocable. In the present case *Walsh* assigned all his effects, &c. over to *Barker*, to whom, amongst others, he was indebted: the power of attorney was made to *Barker* to call in the debts for the benefit of the creditors; it was part of the security for the payment of the creditors. It was therefore by law not revocable; and the payment by the defendant is good. [567]

The jury found a verdict for the defendant.

Erskine and *Lawes* for the plaintiff.

Garrow for the defendant.

OWEN *against* GOOCH.

Tuesday, July 11.

When a party gives an order for another, and at the time tells the tradesman for whose use the goods are, he is only to be considered as an agent, and not liable himself, unless the tradesman refuse to deliver them to the order of the person for whom they are directed, but to his credit who ordered them.

ASSUMPSIT for work and labour, and goods sold and delivered, with the common counts.

Plea of *non-assumpsit*.

The plaintiff was a paper-hanger, and the action was brought to recover a sum of money for work done for the defendant in the course of the plaintiff's business.

He proved the order given for the paper by the defendant, and the work done.

1797.

Owen *against* Gooch.

The defence relied upon was, that though the work had been ordered by the defendant, yet that it had not been ordered for himself, but for a person of the name of *Tippell*, and had been done at *Tippell's* house at *Walthamstow*, and that the plaintiff at the time of the order was informed that the work was on *Tippell's* account.

Defendant having given notice to produce the plaintiff's book; on being inspected, the entry was, "Mr. *Tippell*, by the order of *Gooch*."

[568] The plaintiff contended, that the name of *Tippell* being prefixed to the order, was by no means a proof that the credit was given to him, but was merely identifying the order; that *Tippell* might be a person totally unknown to the plaintiff, but to whom *Gooch* the defendant was certainly known; so that the goods must be deemed to be ordered on *Gooch's* credit, and he be liable.

For the defendant it was insisted, that *Gooch* by the order appeared to be only the agent, and the goods to have been furnished on *Tippell's* account.

Lord Kenyon. The goods are ordered by *Gooch*; but at the time, it is not pretended that they were for his own use; they were ordered for *Tippell*, and the entry is made in his name: we must keep distinct the cases of orders given by the parties themselves, and by others as their agents. If the mere act of ordering goods was to make the party who ordered them liable, no man could give an order for a friend in the country, who might request him to do it, without risk to himself. If a party orders goods from a tradesman, though in fact they are for another,—if the tradesman was not informed at the time that they were for the use of another, he who ordered them is certainly liable, for the tradesman must be presumed to have looked to his credit only: so if they were ordered for another person, and the tradesman refuses to deliver to such person credit, but to his credit only who orders them, there is then no pretext for charging such third person; or if goods are ordered to be delivered on account of another, and after delivery the person who gave the order refuses to inform the tradesman who
[569] the person is, in order that he may sue him, under such circumstances he is himself liable: but wherever an order is given by one person for another, and he informs the tradesman who that person is for whose use the goods are ordered, he thereby declares himself to be merely an agent, and there is no foundation for holding him to be liable.

In

In this case *Owen* the plaintiff was informed of all the circumstances; that *Gooch* was giving the order for *Tippell;* the goods are sent to *Tippell's* house, and the entry made in his name. I think there is no colour for making *Gooch* the debtor.

The plaintiff was nonsuited.

Erskine and *Manley* for the plaintiff.

Gibbs and *Park* for the defendant.

ORD, Esq. *against* RUSPINI.

Tuesday, July 11.

Where the notice of set-off is for money paid to the use of the plaintiff generally, and it appears to have been paid in taking up promissory notes of the plaintiff, such general notice is sufficient without setting out the special matter in the notice of set-off. Vid. ante 560, *Hampton* v. *Jarratt.*—When there are cross demands between parties, which accrued at nearly the same time, for which bills are given, both of which would be barred by the statute of Limitations, and the plaintiff has saved the statute by suing out process, but the defendant has not, the defendant may nevertheless set off these demands.

ASSUMPSIT on a bill of exchange accepted by the defendant, which was due some time in the year 1784.

Pleas, *Non-assumpsit*, Statute of Limitations, and a set-off.

The set-off consisted of bills of exchange and promissory notes of the plaintiff, which the defendant had taken up or paid on his account; they were all dated in the year 1784.

Two objections were made to the set-off. First, That in order to entitle *the defendant to go into evidence respecting those bills and notes, they ought to have been made the special objects of a set-off.

Lord KENYON overruled the objection, and held, that they were good evidence under the count for money paid to the plaintiff's use.

The second objection was, that though the plaintiff's demand against the defendant had accrued so far back as the year 1784, yet in fact he had kept it alive by having sued out process within the six years, and continued it; but that as the defendant had not done so, his demand against the plaintiff must be held to be barred by the statute; and so not such as could demand a set-off.

Lord KENYON said, that as the transactions between the plaintiff and the defendant were all of the same date, and as the bills seemed to have been given in the course of those transactions, and for their mutual accommodation, it would be the highest injustice to allow one to have an operation by law and not the other; and that he would therefore hold the latter to be good as well as the former, and suffer them to be set off.

The defendant proved the payment of the bills and notes as a set-off, and had a verdict.

Erskine *[570]

1797. *Erskine* and —— for the plaintiff.
Adam and *Drew* for the defendant.

571]

Barclay and Proctor *against* Gooch.

If a party gives a promissory note for the debt of another, which the creditor accepts in payment, it is as a payment of money to the party's use, and may be recovered as such.

THIS was an action of *assumpsit* brought to recover a sum of 50*l.* on the ground of its being money paid to the use of the defendant.

The plaintiffs were brewers, and the defendant was a publican, who rented one of their houses, at which a benefit club was held; the members of the club distrusting the credit of *Gooch* (the then landlord) the plaintiffs became his security for the amount of the subscription-money contained in the box: this amounted to 50*l.*

Gooch became insolvent, and the club called upon the plaintiffs for the money as his security, and took their note of hand for it, payable with interest.

The question was, Whether this was a payment of money to the use of the defendant, on which the plaintiffs could recover on that count of the declaration?

Mingay for the defendant contended, that the giving a note for money due by the defendant, to third persons, was not sufficient to maintain an action for money paid, laid out, and expended to defendant's use.

Lord Kenyon held, that the club having consented to take the note from the plaintiffs, it was as payment to them of the money due by the defendant; it was payment of money to his use, and so the action was maintainable.

[572] The plaintiffs accordingly had a verdict.

Erskine and *Praed* for the plaintiffs.
Mingay for the defendant.

In the next term *Mingay* moved for a new trial: but the Court agreed with his Lordship, and refused a rule.

1797.

JENDWINE *against* SLADE.

Wednesday, July 12.

The putting down the name of an artist in a catalogue as the painter of any picture, is not such a warranty as will subject the party selling to an action, if it turns out that he might be mistaken, and that it was not the work of the artist to whom it was attributed.—If a bill is filed to compel the performance of contract and payment of money, and the defendant puts in no answer, and is obliged to pay the money, if he afterwards discovers that he was deceived in the contract, he shall not be barred from his action by having paid the money, if he comes recently after discovering the fraud.

THIS was an action brought to recover damages on the sale of two pictures, one of which was said to be a sea-piece by *Claud Loraine*, the other a fair by *Teniers*, which the defendant had sold to the plaintiff as originals, when in fact they were copies.

The defence relied on was, that they were sold under a catalogue, not amounting to an absolute warranty, but upon which the buyer was to exercise his own judgment; and further, that a bill had been filed by the defendant, two years ago, to compel the plaintiff to complete the sale; to which he had put in no answer, but paid the money, and that therefore he could not now seek to rescind the contract after such acquiescence.

The plaintiff's counsel answered this objection, by insisting that the name of the artist put opposite any picture in a catalogue was a warranty; and if *the article sold did not correspond with it, it avoided the sale; and as to the transaction in respect to paying the money, that the plaintiff was deceived, but had brought his action as soon as he discovered the fraud. *[573]

Several of the most eminent artists and picture-dealers were called, who differed in their opinions respecting the originality of the pictures.

When the evidence was closed,

Lord KENYON said, It was impossible to make this the case of a warranty; the pictures were the work of artists some centuries back, and there being no way of tracing the picture itself, it could only be matter of opinion whether the picture in question was the work of the artist whose name it bore, or not. What then does the catalogue import? That, in the opinion of the seller, the picture is the work of the artist whose name he has affixed to it. The action in its present shape must go on the ground of some fraud in the sale. But if the seller only represents what he himself believes, he can be guilty of no fraud. The catalogue of the pictures in question leaves the determination to the judgment of the buyer, who is to exercise that judgment in the purchase.

With respect to the bringing of the action, his Lordship added, that if any fraud has been committed in a sale, if the party

1797.

JENDWINE *against* SLADE.

party comes recently after discovery of the deception, he is not barred by circumstances having taken place, such as were stated.

The cause was referred to arbitration.

Erskine and *Lawes* for the plaintiff.

Law and *Fielding* for the defendant.

[574]

CROSS *against* GLODE, Knt. and another, SHERIFFS OF LONDON.

The mere possession of goods is not sufficient to subject them to an execution issued against the person so possessing them, if it be satisfactorily proved that they were really and *bona fide* sold to a third person as a trustee for his wife, and possession taken by such third person.

THIS was an action of trover for a variety of articles of household furniture which had been taken by the defendants, as sheriffs of *London*, under an execution, at the suit of one *Kennett* against *Montiero*.

There was no dispute, as to the fairness or regularity of the execution; but the ground of the action was, that the goods in question were the separate property of Mrs. *Montiero*, and purchased in the name of the plaintiff as her trustee, with her money, under an execution which had issued in *May* 1796 against *Montiero*. The taking in this case was in *August* in the same year.

The plaintiff proved by several conveyances a separate property in Mrs. *Montiero*, consisting of an estate in *Sussex*; he then called the receiver of the estate, who proved two remittances made on account of underwood cut on the estate in *Sussex* in the months of *January* and *April* preceding the execution. He then provèd the execution in the month of *May*, the inventory of the furniture then made, the payment of the value of them, and the execution of the bill of sale by the sheriff to *Cross* the plaintiff, as trustee for Mrs. *Montiero*.

For the defendants *Erskine* stated, that he grounded his defence to this action on this: That though the bill of sale had been executed by the sheriff to *Cross*, possession had never fol-

[575]

lowed, but that *Montiero* still continued in possession, and the same visible owner as before.

Lord KENYON. Whatever might have been my opinion, had this been a new case, I must hold myself bound by decided cases. The case of *Cadogan* v. *Kennett*, *Cowp*. 432, applies to the present in every point. Undoubtedly the plaintiff must be held to great strictness of proof, as the possession continued as before

before the goods were sold; but when such change of property is made out, the mere possession is not sufficient to warrant us in saying the goods shall be deemed the property of the husband. The plaintiff has made this out, and is entitled to recover.

The plaintiff accordingly had a verdict.

Gibbs and *Park* for the plaintiff.

Erskine and *Espinasse* for the defendants.

BOEHM and Others *against* STERLING and Others.

Friday, July 21.

If a person takes a banker's check after the day it is due, for a valuable consideration, he is not by that circumstance alone precluded from recovering against the drawers of such check. He is in most cases; but here the check was dated nine months before defendants issued it. In *Taylor* v. *Mather*, 3 T. R. 80, it is held, that whoever takes a negotiable instrument after it is due, takes it upon the title of the person from whom he receives it, and subject to all the equities as between such person and the party who is liable on the face of the instrument.

THIS was an action of *assumpsit* on a banker's check for 2444*l*. 14*s*.

The case in evidence was, that the defendants had drawn a bill on Messrs. *Muilman* and Company, at three months, for 2444*l*. 18*s*. which was payable on the 17th *Feb*. 1797; previous to which time the defendants* deposited with *Muilman* and Co. a check on their banker for the amount, payable to bearer, to provide for payment of the bill in case of their inability.

The check was, by mistake, dated the 27th of *February* 1796, instead of 1797; and on the 20th of *January* 1797, *Henry Nantes*, a partner in the house of *Muilman* and Co. gave the check in question in part of a security for a loan of 5000*l*. advanced for the use of *Muilman* and Co.

The bill drawn by the defendants on *Muilman* and Co. not being paid by them, the defendants were obliged to take it up, and they therefore stopped payment of the check they had deposited for that purpose; and the present action was brought against them as the drawers, by *Boehm* and Co. the holders of the check.

On the part of the plaintiffs it was contended, that the transactions between *Muilman* and Co. could not affect the title of the plaintiffs, who never were *bonâ fide* holders of the check; and that the circumstance of its being dated eleven months before it was presented for payment, did not injure plaintiff's title by inference of laches or suspicion, as in the case of a bill of exchange payable at a certain day, and yet negotiated after that day.

For the defendants it was urged, that the plaintiffs, in taking the

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the check eleven months after the date on which it purported to be drawn, took it under circumstances of suspicion, which precluded them from any other or better title than that of *Muilman* and Co. to recover the amount; and that bank-notes and notes of country bankers did not lose their negotiability after the date on which they are payable; it was because they were part of the circulating medium of the country. But that a banker's check is not made for the purpose of being passed from hand to hand, being merely an authority to receive the sum specified; and if not presented in a reasonable time, carries on the face of it a suspicion fatal to the attempt of setting up a better title than that of the person from whom it was received.

Lord KENYON, after observing on the mercantile importance of the case, declared it to be his opinion, that the plaintiffs, being holders of the check for a valuable consideration, were not affected by the transactions between the defendants and *Muilman* and Co.

His Lordship added, If it is admitted that the holder of a check is not obliged to present it for payment on the very day of its date, who shall say what is a reasonable time? If this cannot be fixed, there is in the present case no *laches* to impeach the plaintiffs' right of action against the defendants, though in the case of the banker's insolvency the holder of the check would inevitably be the loser. In many instances, a party taking a check over-due, may not know whether it was in *London* or the country. Is he therefore to presume fraud?

The plaintiffs had a verdict.

Garrow and *Park* for the plaintiffs.

Erskine, *Giles*, and *Balmanno*, for the defendants.

In the next term (*a*) a new trial was moved for: but the Court of King's Bench agreed in opinion with his Lordship, and discharged the rule.

(*a*) Vide 7 Term Rep. 423.

1797.

SMITH and Others, ASSIGNEES OF STAPLES, *against* BOWLES and Others.

July 22.

When a party remits money on a particular account or for a particular purpose, and the consignee becomes insolvent, it may be stopped *in transitu*: *aliter* where it is a general remittance from a debtor to his creditor on account of his debt.

THIS was an action of trover, brought by the plaintiffs as assignees of Messrs. *Staples* and Co. bankrupts, to recover 3000 dollars, under the following circumstances.

Mr. *Staples* and the other bankrupts, who previous to their bankruptcy were bankers in *London*, had dealings with a person of the name of *Turner*, who lived at *Penryn* in *Cornwall*. *Turner*, being considerably indebted to the bankrupts, sent up the dollars in question from the country, in part payment of his debt. Before the dollars reached *Staples* and Co. they had become bankrupts, and had left their house. The defendants, who were also creditors of *Turner*, wrote to him, requesting that they might have these dollars which had reached *London*, and were then in the possession of a carrier; and they accordingly obtained possession of them. Both parties therefore claimed those dollars under *Turner*, who was indebted to them both to a large amount; and the plaintiffs brought the present action, on the grounds that the defendants had appropriated to their own use that money which *Turner* had sent to his creditors, Messrs. *Staples* and Co., towards the extinguishment of his debt with them.

[579]

Erskine for the plaintiffs admitted, that if *Turner* had sent goods from the country to Messrs. *Staples* and Co. and before such goods had reached their hands, they had become insolvent, *Turner* might certainly have stopped them *in transitu*; but contended that the present case was totally different, inasmuch as these dollars were money sent to the bankrupts towards diminishing a just and fair debt formerly contracted; and that therefore the doctrine of the owner's right to stop *in transitu* did not apply to this case.

Lord KENYON said, he thought the dollars were not countermandable. If they had been sent on any particular account, and described as such, and *Turner* apprehended the bankruptcy of *Staples* and Co. he might have stopped them: but here was a remittance of money, not made on a particular account, or for a particular purpose, but a general remittance from a debtor to his creditor. There was an appropriation in favour of persons who were *bonâ fide* creditors; and he was therefore of opinion that the defendants had no right to the possession of the property against the assignees of *Staples* and Co.

His

1797.

SMITH *against* BOWLES.

His Lordship added, the first great precedent on this point was established by Lord *Hardwicke*, in the case of the late Mr. *Prescott*, who decided, that if a person consigned goods to another, and the consignee became insolvent before the goods came into his hands, the consignor might stop them *in transitu*, and recover the possession of them by any means short of felony. This precedent goes in support of justice; for it is [580] clear that if the consignee is not in a situation to pay for goods, the owner has a right to stop them before they get to the consignee's hands; but if this principle was applied to the present case, it would, instead of supporting, subvert the principles of justice.

The plaintiff had a verdict for 672*l.* the value of the dollars.

Erskine, *Garrow*, and *Wigley*, for the plaintiff.

Law and *Walton* for the defendant.

[581]

IN THE COMMON PLEAS.

SITTINGS AFTER TERM AT GUILDHALL.

SPARENBERGH *against* BANNATYNE.

A foreigner born in a state in peace with this country, and taken on board an enemy's ship, and made a prisoner of war, may sue on a contract made after he was taken prisoner, and while he is in confinement as such.

THIS was an action of *assumpsit*, to recover wages due to the plaintiff for his service as a seaman on board a ship called the *Caledonia*.

Pleas.—1st, The general issue.—2d, That plaintiff was an alien, born in *Holland*, out of the allegiance of the King of *Great Britain*; that before the commencement of the action there was a public and open war between the King of *Great Britain* and the persons exercising the powers of government in *Holland*; and that the plaintiff, before the commencement of the action, was, and ever since had been, and still is, an enemy of the King of *Great Britain*.—There was a third plea similar

similar to the second, except omitting that he was an alien, born in *Holland*. 1797.

SPARENBERGH *against* BANNATYNE.

Replication to the first plea joining issue.—To the second, That he was, at the time of making the promises and undertakings, a prisoner of war, in custody of the forces of the King of *Great Britain;* and that, by the consent of the officer commanding his Majesty's forces at the island of *St. Helena*, he was retained and employed by the defendant as a seaman; and [582] that he did serve as such on board the ship *Caledonia*, from *St. Helena* aforesaid, to the port of *London;* traversing, that at the time of commencing the action, or at any time since, he was an enemy of the King of *Great Britain*, or adhering to his enemies.—A similar replication to the third plea, and issues thereon.

The case in evidence was, that the plaintiff, who was a native of *Oldenburg* in *Germany*, was taken prisoner at the *Cape of Good Hope*, serving on board admiral *Lucas*'s fleet, and was sent as a prisoner on board a *British* frigate. That the *Caledonia*, a *British* merchantman then lying at *St. Helena*, on her homeward-bound voyage, being in great want of hands to navigate the ship, the defendant, who was captain, applied to the governor of *St. Helena*, for permission to engage some of the *Dutch* prisoners to navigate the ship home; that the governor gave him such permission, and that he engaged the plaintiff, among others, to serve as a seaman during the voyage home; that the plaintiff accordingly went on board and did his duty as a seaman, and was treated like the rest of the crew during the voyage; that on the ship's arrival at the port of *London*, he was turned over, with the other prisoners taken on board the *Dutch* fleet, to the commissary; and at the time of the action brought, was in custody as a prisoner of war.

On this case being made out, the defendant's counsel insisted that the action could not be maintained; as it appeared that the plaintiff was an alien, taken in arms against the King of *Great Britain*.

For the plaintiff it was answered: first, that he was not an [583] alien enemy born, being a native of *Oldenburg*, and a subject of a state in amity with the King of *Great Britain;* but that, even admitting him to be an alien born, having entered into the contract by the licence of the King's officer, that licence might be presumed to be granted by the King himself; and that a licence to contract, implied a licence to sue.

EYRE,

1797.

SPARENBERGH *against* BANNATYNE.

EYRE, Ch. J. said, That it was not absolutely necessary that the party should be *born* an alien, in order to incapacitate him from suing in this country; for if the right sued for was acquired in a state of hostility, or if at the time he sued he was residing in the enemy's country, he would hold him to be an alien enemy, and consequently incapacitated to sue. But this case was different: here a neutral is taken in the act of hostility to this country, and *quoad* that act must be taken to be a subject of that power under whose commission he acted, and consequently no alien enemy. But how did he become so? Not in consequence of any permanent character of an enemy, but because he had joined in an act of hostility; for this act he remains in the hands of the King; but his being merely in prison does not make him an enemy; while he continued in the service of the enemies, he was an alien enemy; but when that service ceased, he ceased to be so too. Therefore, as the right for which the plaintiff sues was acquired after he ceased to be in the service of the enemies of the King, I think he is entitled to recover.

[584] The plaintiff accordingly had a verdict for 24*l.*, the amount of the wages claimed.

Marshal, Serjt. and *Espinasse* for the plaintiff.

Shepherd, Serjt. and *Heywood* for the defendant.

In the next term (*a*) the defendant moved for a new trial; but the Court of Common Pleas concurred in opinion with the Chief Justice, and discharged the rule with costs.

(*a*) Vide *Bosanquet* and *Puller's* Rep. 163

SUMMER ASSIZES

1797.

AT MAIDSTONE,

CORAM EYRE, CHIEF JUSTICE.

PARROT *against* MUMFORD, SHERIFF OF KENT.

An action for false imprisonment lies against the sheriff for an arrest made by the bailiff after the return-day of the writ.

TRESPASS and false imprisonment.

Plea of Not Guilty.

The action was brought to recover damages for a supposed irregular arrest, under a writ directed to the defendant as sheriff of *Kent*.

The plaintiff proved a copy of the warrant from the defendant as sheriff, directed to one *Markett*, who was his officer. The writ and the warrant grounded on it was to have the plaintiff's body on the 3d day of *November*, the essoign day of *Michaelmas* term. He then proved, that he was arrested on the 4th of *November*, which was after the return of the writ; that he continued in custody until *Hilary* term, when a new detainer was lodged against him. He applied to the Court, and was discharged by rule of Court.

Bailey for the defendants contended, that the plaintiff had not made out his case; that in order to support this action, the sheriff must be connected with the bailiff, whose tortious act it was; and that the only tortious acts of the bailiff for which the sheriff was liable, were such as were done under colour of his office, and while acting under the authority derived from the sheriff. [586] In the present case, the warrant, which was his authority, expired on the 3d of *November;* on the 4th his authority was at an end: on that day the wrong took place, but

could

1797.

PARROT *against* MUMFORD.

could not be said to be done by colour of the authority of the sheriff, who had only empowered him to act till the 3d.

The plaintiff's counsel answered, that the doctrine contended for went the length of maintaining that the sheriff could in no case be liable, as he could not be supposed in any case to confer an authority to do a wrong; but they contended, that he was in all cases liable for the misconduct of his officers while acting under colour of an authority derived from him; and that the case of *Woodgate* v. *Knatchbull*, 2 *Term Rep.* 148, and a case of *Tyte* v. *Glode*, established this point. At all events, they relied that the plaintiff, having been in the sheriff's gaol for three months, and being put there wrongfully, the action was maintainable for that time.

EYRE, Ch. J. The true ground upon which the sheriff in these cases is held to be liable is, that he has thought fit to commit the execution of the writ to another person; and if *he* has not executed it properly, the sheriff is liable. The officer is the servant of the sheriff, and executing process directed to him; if therefore he acts irregularly, the law subjects the sheriff, from whom he derives that authority. But clearly the gaoler is the officer of the sheriff; he has received the plaintiff and detained him.—I think this action is maintainable.

Verdict for the plaintiff 5*l*.

Shepherd, Serjt. and *Marryat* for the plaintiff.

Bailey for the defendant.

CASES

1797.

ARGUED AND RULED

AT

NISI PRIUS

IN THE

KING'S BENCH

IN

MICHAELMAS TERM, 38 GEORGE III.

FRANKS *against* DUCHESS DE LA PIENNE.

When a party has furnished goods to a foreigner, and, he having left the country, continues to furnish goods to his wife after his departure, the wife is liable for such goods as were furnished subsequent to the time her husband left the kingdom.

THIS was an action of *assumpsit* for a milliner's bill.

The first article in the bill was delivered in the month of *February*, at which time it was proved that the *Duc de la Pienne*, husband of the defendant, was in *England*, and that he and the defendant lived together.

In the year 1793, the Duke left *England* to serve in the combined armies, with the intention of returning.

For the plaintiff, the case of *Walford* (*a*) against the same defendant* was relied upon; and her counsel contended, that the doctrine then held by Lord Kenyon was decisive of the present case.

(*a*) Ante 551.

1797.

Franks *against* Duchess De la Pienne.

It was answered, that in the former case the first *item* in the bill was subsequent to the Duke's leaving the kingdom; the plaintiff in that case never dealt with the Duchess while the Duke lived in *England;* and that, although it might be said, that this being a running account, and part of the goods having been claimed after the Duke left the country, the Duchess ought to have paid money into Court; yet that could not be; these were not different contracts, but a continuation of the same contract.

Lord Kenyon said, the contract can be divided: while the husband resided here, the wife could not be charged; but when the husband, a foreigner, left the kingdom, the wife then became liable; and the rule laid down in the case of *Walford* against the Duchess (*Ante, p.* 554,) applies. Had this been the case of an *Englishman,* who might be presumed to have the *animus revertendi,* it might be different; but here is a complete desertion of the country, and she must be liable.

The plaintiff accordingly had a verdict for the amount of the bill from the time of the husband's leaving the kingdom.

Garrow and *Park* for the plaintiff.

Erskine and *Gibbs* for the defendant.

SITTINGS AFTER TERM AT WESTMINSTER.

[589]

Wednesday, Nov. 29.

Doe ex. dem. Phillips, Esq. *against* Butler.

What shall be deemed a sufficient notice to quit, when the commencement of a tenancy is not known.

THIS was an ejectment for premises in *Crown-court, Moorfields.*

The defendant rented premises of the lessor of the plaintiff, and the rent having been unpaid for a great length of time, this ejectment was brought to recover possession of the premises.

The premises in question were part of a considerable estate which the plaintiff had let; and the defendant not having taken them of the plaintiff, but of his tenant, it was not exactly known at

at what time his tenancy commenced; and the following notice to quit was therefore given: 1797.

PHILLIPS *against* BUTLER.

'*William Butler*,

'Take notice, that I hereby require you to quit and deliver 'up to me the possession of the house and premises you hold of 'me, situate in *Rose-and-Crown Court*, *Moorfields*, in the parish 'of *St. Leonard*, *Shoreditch*, in the county of *Middlesex*, at the 'end and expiration of the current year of your tenancy thereof, 'which shall expire next after the end of one half year from 'the date hereof. Dated this 20th day of *June* 1796.

'J. PHILLIPS.'

The only question was, Whether this was a sufficient notice to quit, so as to entitle the lessor of the plaintiff to recover possession of the premises, no particular day being mentioned? [590]

Lord KENYON held that it was sufficient; and the plaintiff accordingly had a verdict.

Erskine and *Marryatt* for the plaintiff.

Garrow for the defendant.

FERGUSON *against* ———

A tenant from year to year is only bound to fair and tenantable repairs, so far as to prevent waste or decay of the premises; not to substantial and lasting repairs, such as new roofing, &c.

THIS was an action to recover damages, for suffering an house of the plaintiff to be out of repair.

The case on the part of the plaintiff was, that the defendant had rented an house of him, as tenant at will, at a rent of 31*l.* *per annum*, which he had quitted. After the defendant had given up the possession, the house was found to be very much out of repair; and the plaintiff had an estimate made of the sum necessary to put it into complete and tenantable repair; which sum he sought to recover in the present action.

Lord KENYON said, It was not to be permitted to plaintiff to go for the damages so claimed. A tenant from year to year is bound to commit no waste, and to make fair and tenantable repairs, such as putting in windows or doors that have been broken by him, so as to prevent waste and decay of the premises; but in the present case the plaintiff has claimed a sum for putting on a new roof on an old worn-out house: this I think the tenant is not bound to do, and that the plaintiff has no title to recover it. [591]

1797.

BECKFORD *against* WELBY, Esq. Sheriff of LINCOLN.

When a party appoints his own bailiff, the sheriff cannot be called upon for a return of the writ; but if he does return it, he subjects himself to an action if the writ has not been properly executed.

THIS was an action on the case against the defendant, as sheriff, for an escape.

The writ was a *ca. sa.* against one *Timothy West*, on a judgment of *Easter* term, and was returnable the first return of *Trinity* term.

The plaintiff proved the judgment, the issuing of the writ, and the sheriff's return of the *cepi corpus*; he then proved, that after the return of the writ *West* was seen at large, and that in fact he did not go to prison until the 6th of *September* following; and there rested his case.

Yates for the defendant stated his defence to be, that *Meakings* who was an attorney for the plaintiff in the action against *West*, had inclosed the writ in a letter addressed to one *Sleigh* a bailiff; that he had arrested *West*, but that the writ had never gone into the sheriff's office, and of course no warrant had been made out to *Sleigh* as bailiff of the sheriff; he therefore con-[592]tended, that the sheriff was not liable; and relied on the case of *De Moranda* v. *Dunkin*, 4 *Term Rep.* 119, in which it was resolved, that when a party appoints his own bailiff, he cannot rule the sheriff to return the writ (*a*).

Lord KENYON said, he subscribed entirely to the law laid down in that case; but added, that in the present case, though the plaintiff could not have called upon the sheriff for a return of the writ, nor was the sheriff bound to make one, yet having done so, he bound himself by the return, and was therefore liable for the escape.

The plaintiff had a verdict.

Wood for the plaintiff.

Yates for the defendant.

(*a*) 2 Bl. 952. 8 Term Rep. 506.

BELLIS *against* BEAL.

THIS was an action of debt on the stat. 25 *Geo.* 2. *c.* 36. for keeping a house for public dancing and music, without having a licence.

A room in which musical performances are regularly exhibited, though it is not kept or used solely for that purpose, is within the meaning of the stat. 25 *Geo.* 2. *c.* 36.

The evidence on the part of the plaintiff was, that *Beal*, the defendant, who kept a tavern, had a large tea-room in which was an organ, and which was open to all persons.

Some women of the town were called, who proved that they and all persons of that description were admitted.

There was some doubt whether there was an organist regularly kept; the evidence only going to prove that one *Lowndes*, who was an organist, generally played there; but that others were permitted to play if they chose it. [593]

Mingay for the defendant contended, that this was not an offence against the statute. This statute was framed at a time when improper conduct had taken place at houses of this description; if any room was kept openly and avowedly for the purpose of musical entertainments, it would be within the statute; the music here was but a secondary consideration: in order to bring it within the statute, it must be kept expressly for the purpose of exhibiting musical performances.

Lord KENYON. The construction ought to correspond with the intention of the Legislature; it is not like the case of an inn or place of that description; here there was a regular opening of the room, from *Easter* to *Michaelmas;* there was an organist who attended regularly; whether he was paid or not, makes no difference; the true construction of the act of parliament is, that this is a room for musical entertainments, and the defendant is therefore subject to the penalty.

The plaintiff had a verdict.

Erskine, *Garrow*, and *Bailey*, for the plaintiff.

Mingay, *Gibbs*, and *Sellon*, for the defendant.

797. IN THE COMMON PLEAS.

SITTING-DAY AFTER TERM AT GUILDHALL.

Thursday, Nov. 30th.

WOOD *against* AKERS.

A debt owing by the wife *dum sola*, cannot be set off to an action brought by the husband alone, unless he has promised to pay the debt after marriage, and thereby made it his own.

THIS was an action of *assumpsit*, for money lent and goods sold and delivered.

Plea, *non-assumpsit*, with notice of set-off.

The articles contained in the set-off were three several sums of money, which were stated to have been paid by the defendant for the plaintiff, and by his direction.—One of them was a sum of six guineas, stated to have been paid to a Mrs. *Gundry*, which the plaintiff's wife, who was a sister of the defendant, owed her for lodging before her intermarriage with the plaintiff.

The counsel for the plaintiff objected to the allowance of this sum in the present action, on the ground that this was an action by the husband alone, and the debt attempted to be set off was a debt due by the wife before marriage; for which the action should be against husband and wife.

It was answered, that the husband having ordered the money to be paid, had thereby made the debt his own.

EYRE, C. J. said, That for a debt of the wife *dum sola*, the action must be against husband and wife; and therefore could [595] not be set off against a claim made by the husband alone, and for which the action was brought; but if it appeared that the husband, after the marriage, had ordered the debt to be paid, he thereby made it his own, and that it could be set off.

The defendant proved that the husband had done so, and was allowed the sum in his set-off; but the plaintiff had a verdict for the residue of his demand.

Cockell, Serjt. and *Espinasse* for the plaintiff.

Shepherd, Serjt. for the defendant.

ADJOURNMENT DAY AT WESTMINSTER.

1797.

DOE ex dem. HUNTER et al. *against* BOULCOT et al.

Friday, Dec. 1.

An agreement for a lease of premisses, though under 5*l. per ann.* is not within the exception of the stamp act, if the interest agreed for be a beneficial one. In order to overreach a commission of bankrupt, by proving an act of bankruptcy committed previous to the time the petitioning creditor's debt accrued, proof of an act of bankruptcy is not alone sufficient; it should also be shewn, that there was a good petitioning creditor's debt at the time of the first act of bankruptcy.

THIS was an ejectment for certain premisses at *Pentonville*.

The declaration contained four counts on the demises of *Thomas Hunter*, *John Hunter*, *John Gibson*, and *Thomas Shrewsbury*.

The circumstances of the case were as follow:—

Thomas Hunter had become a bankrupt, and the defendants were his assignees. By a lease bearing date in *June* 1795, the ground on which the *premisses in question were built was demised by a Mrs. *Lembrick* to the bankrupt. The premisses consisted of a large house and three smaller tenements; the three small tenements were claimed by *Gibson*, under a demise of the ground on which they stood: to prove this demise, he produced an unstamped agreement for the demise of that part of the ground leased by Mrs. *Lembrick* to *Thomas Hunter*, at 3*l. per annum;* upon this piece of ground the three smaller tenements had been erected; and *Gibson* proved that they had been built by him.

*[596]

The defendants' counsel objected to this agreement being given in evidence, as it was not stamped.

It was answered by the plaintiffs' counsel, that this was within the exception of the stamp act, and did not require a stamp, as being a demise of premisses under 5*l. per annum*, namely, for 3*l.*

For the defendants it was contended, that that clause of the statute only applied where the letting was on a rack-rent; but this was a beneficial interest, being a building lease.

EYRE, C. J. said, He was of opinion that this was a beneficial interest, and so was not within the exception of the act (*a*); and that the agreement therefore required a stamp.

In going into the title under the bankruptcy, the defendants relied upon an act of bankruptcy committed early in the month

(*a*) 37 *Geo.* 3. *c.* 3. *s.* 3.

of

1797. — HUNTER *against* BOULCOT.

of *December* 1796; the petitioning creditor's debt accrued in the months of *August* and *September* in the same year.

The counsel for the plaintiffs then proceeded to give evidence of an act *of bankruptcy in the *April* preceding, and proved an absconding from his dwelling-house at that time; and then relied, that this having preceded the petitioning creditor's debt, the commission could not be supported.

*[597]

For the defendants it was contended, that the mere proving of an act of bankruptcy preceding the petitioning creditor's debt, upon which the present commission was founded, would not be sufficient, unless they proved that at that time there were debts due by *Hunter*, upon which a commission could be sued out.

Le Blanc, Serjt. as an *amicus curiæ*, mentioned, that this point had been so decided in the Court of King's Bench, on a motion for a new trial from the *Norfolk* circuit, where the Judge having ruled the evidence of the act of bankruptcy only was sufficient, without proving a petitioning creditor's debt subsisting at the time of the act of bankruptcy committed, the Court granted a new trial; as otherwise a trader might defeat every commission of bankruptcy sued out against him (*a*).

EYRE, C. J. said, This was perfectly new law to him; and if it was law, numberless determinations in the books, which have been held to be law, must now be held otherwise. If the Court of King's Bench had held that to be law, he should hold himself bound by it; but it could not affect the present case as, from the evidence produced by the defendant, there appeared to be a petitioning creditor's debt in being at the time the first act of bankruptcy was committed.

[598]

The plaintiffs had a verdict.

Clayton, Serjt. *Heywood*, Serjt. and *Marryatt*, for the plaintiffs.

Shepherd, Serjt. *Runnington*, Serjt. and *Espinasse*, for the defendants.

(*a*) This point was so expressly ruled by Lord *Kenyon*, in the case of *Parker* v. *Manning*, Sittings after *Trinity* term, 38 *Geo.* 3. at *Guildhall*.

1797.

ADJOURNMENT DAY AT GUILDHALL.

SEARLE et al. *against* KEEVES.

A written order given by the seller of goods to the buyer, directing the person in whose care the goods are to deliver them, is a sufficient delivery within the statute of frauds.

THIS was an action on the case, for the non-performance of a contract.

Plea, *non-assumpsit.*

The declaration stated, that in consideration that the plaintiffs had bought of the defendant twenty barrels of rice, at the price of 17*s.* *per* hundred weight, the defendant undertook to deliver that quantity; and assigned a breach in the non-delivery.

The evidence for the plaintiffs in support of this declaration was, that on the 26th of *September* one of the plaintiffs having been at the house of the defendant, the defendant told him that [599] he had a quantity of rice to sell; but there was no evidence to prove any contract made at that time. The plaintiffs produced an order on *Bennet* and Co. to deliver to them twenty barrels of rice, which was signed by *Keeves;* and witnesses proved that *Keeves* had told him that he had sold twenty barrels of rice to Mr. *Searle*, at 17*s.* *per* hundred; and that he was a fool for selling it so soon, as the price of rice had advanced.

The plaintiffs then proved the delivery of the order for the rice to the warehouseman of *Bennet* and Co.; and that the rice not being then taken away *Keeves* on the 2d of *October* countermanded the delivery to *Searle* the plaintiff; in consequence of which *Bennet* and Co. refused to deliver the rice to *Searle*, who sent for it on the 10th of *October* following.

The counsel for the defendant contended, that as to this count the plaintiffs ought to be nonsuited: they said that the statute of Frauds in all cases of sales of goods required a note in writing, specifying the terms of the contract; and being meant to guard against frauds in contracts, made it necessary to specify particularly what the terms of the sale were; in this case there was no specification of the terms; the only evidence was, the order for the delivery by the defendant, which did not specify any

1797.

SEARLE *against* KEEVES.

any thing as to the price, so that it was not a sufficient note in writing under the statute.

EYRE, Ch. J. The statute of Frauds does not attach where there has been earnest or a delivery of part of the things sold: I think there has been in this case a delivery of the whole. [600] *Keeves* the defendant gave an order for the delivery upon *Bennet* and Co. in whose psosession the rice then was; this satisfies the statute, and the plaintiffs are entitled to recover.

The plaintiffs accordingly had a verdict.

Cockell, Serjt. and *Espinasse* for the plaintiffs.

Shepherd, Serjt. and *Bailey* for the defendant.

JONES *against* BOOTH et al.

Where money has been paid without authority to a third person and an action is commenced against the person who has so paid it, a compromise between the plaintiff and such third person, after the action is commenced and a judge's summons taken out to stay proceedings on payment of debt and costs, will not avail the party as a defence to such action.

THIS was an action of *assumpsit* brought to recover the amount of the plaintiff's share of prize-money, as a seaman on board the *Dudgeon* privateer of *Liverpool*, of which the defendants were the owners.

Two captures had been made by the privateer; the share of the plaintiff in one was 23*l.* 13*s.* 4*d.*; in the other 29*l.* 3*s.* 10*d.* The former sum had been paid to the plaintiff's agent; and this action was brought to recover the other sum of 29*l.* 3*s.* 10*d.*

The defence was that one *Thom*, a slopseller of *Liverpool*, had made a demand, as executor of the plaintiff, (whom he stated to be dead) on the defendants, and produced the letters of administration granted to him, and that they had paid the sum due to the plaintiff to *Thom* in pursuance of such authority. —They further proved that the plaintiff afterwards returned to *Liverpool*, and that on his return *Thom* had arrested him and held him to bail for 44*l.* When he was in gaol, he sent one *Hughes* (*who was called as a witness) to endeavour to make terms with him; upon which *Thom* went to the gaol and released the plaintiff, on his giving him a promissory note for 28*l.* 17*s.* and admitting a receipt from the defendants by *Thom* for 30*l.* the balance of prize-money. *[601]

The plaintiff, upon this, proved by his attorney, that prior to the time this compromise took place between him and *Thom*, the declaration in the cause was delivered, *viz.* in *February*, and

and a summons taken out before a judge by the defendants, to stay proceedings on payment of debt and costs in *April* last.

EYRE, C. J. If this circumstance of the compromise having taken place had stood alone, I should have been strongly of opinion that it made an end of the cause; but having taken place after the commencement of the action, and after a summons to stay proceedings, upon payment of debt and costs, I think the defendants will do right to submit to a verdict against them and to take their remedy against *Thom*. But when we consider that the plaintiff was in custody at the time he made the agreement, and that too at *Thom*'s suit, I think it deserves no countenance in a court of justice.

The plaintiff had a verdict.

Cockell, Serjt. and *Barrow* for the plaintiff.

Shepherd, Serjt. for the defendants.

[602]

MILLER *against* JOHNSON.

Thursday, Dec. 14th.

An item of the plaintiff's demand appearing on the face of defendant's set-off, given in under a judge's order is not such an admission as supersedes the necessity of plaintiff's proving it.

ASSUMPSIT for goods sold and delivered.

Plea, General issue, and notice of set-off.

The case on the part of the plaintiff was, that *Miller* being possessed of a number of lottery tickets, had sold them on the 20th of *February* last to the defendant, and had received in payment a note purporting to be a Bank of *England* note for 50*l*. No. 1791, dated *Dec.* 22, 1795.

Miller paid this note to *Da Costa*, and after having passed through several hands, on being tendered for payment at the Bank, it was stopped as being a forgery.

The fact of its being a forgery was proved by a clerk of the Bank; and the present action was brought to recover the amount of the 50*l*. so paid by the note, as the price of the lottery tickets.

To prove the sale of the tickets, *Le Blanc*, Serjt. of counsel for the defendant, produced the particular of the defendant's set-off, given in under a judge's order, in which the sale of the tickets was mentioned.

1797. Miller *against* Johnson. *[603]

Eyre, C. J. said, It was never the intention in compelling a party to give in a particular under a judge's order, to make him furnish evidence *against himself, nor could it be made such use of; other evidence ought to be given of the fact, though it stood on the face of the particular.

The defendant admitted the sale, and the plaintiff had a verdict.

Le Blanc, Serjt. and *Wigley* for the plaintiff.

Shepherd, Serjt. and *Henderson* for the defendant.

END OF MICHAELMAS TERM IN THE COMMON PLEAS.

END OF PART IV.

CASES

ARGUED AND RULED

AT

NISI PRIUS;

MICHAELMAS TERM, 38 GEO. III.

SITTINGS AFTER TERM, AT WESTMINSTER.

1798.

PIESLEY *v.* VON ESOH.

Monday, Dec. 5.

Where an attachment has been granted against the sheriff for not putting in bail, but which has been afterwards set aside on terms, one of which is, that the attachment shall stand as a security; in such case the bail to the sheriff are not admissible witnesses for the defendant.

THIS was an action of assumpsit on a bill of exchange. Plea *non-assumpsit*.

The plaintiff proved the defendant's hand to the bill, and there rested his case.

The defendant's counsel called the brother to the defendant, to prove the case he meant to set up in defence of the action.

He was objected to, as being one of the defendant's bail; and the bail-bond was produced.

It was answered,—that the production of the bail-bond only proved the witness to have been bail to the sheriff, not bail above; that in fact he had not been bail above, for that other bail had justified.

Lord KENYON said, if this was so, it should be proved by the production of the rule for the allowance of bail, by which it would have appeared what bail had justified.

The defendant's counsel answered, that this was in the possession of the plaintiff, it being served on him; but they then suggested that the defendant must have put in bail above, otherwise he could not be in court, as he could not have pleaded till then; and that of course the bail-bond was at an [606]

1798. PIPSLEY v. VON ESCH.

an end, the conditions being performed. His Lordship then ruled, That the production of the bail-bond did not establish that the witness was bail above, as it could not be inferred, as of course, that he was bail above, because he had been bail to the sheriff: that therefore, under the circumstances of the case, there was no objection to his testimony.

The defendant's counsel were then proceeding to examine him, when the plaintiff's counsel produced another rule of court, made in the cause, by which it was ordered, "That the "attachment which had issued against the sheriff, in the cause "of *Piesley* v. *Von Esch*, should be set aside upon payment of "costs, and the attachment standing as a security, the defendant "having put in and perfected bail."

Lord KENYON. This is a decisive objection; the attachment is by the rule produced in evidence to stand as a security; under [607] it, therefore, the sheriff may be called upon to pay the debt; and if he is compelled to pay it, he has his remedy over against the witness as bail on his bail-bond: this renders him clearly incompetent.

The witness was therefore rejected, and the plaintiff had a verdict for the bill.

Erskine and *Wigley* for the Plaintiff.

Garrow for the Defendant.

SMITH v. VALE.

Plaintiff may be nonsuited, though the defendant has paid money into court.

ASSUMPSIT for goods sold and delivered.

Plea of the general issue, with notice of set-off, and the defendant had paid 30*l.* into court.

The defendant proved a set-off, exceeding the amount of the plaintiff's demand; upon which the plaintiff wished to be nonsuited.

This was opposed by the defendant's counsel, who insisted that the defendant was entitled to a verdict, the plaintiff having been precluded from the right of being nonsuited by the defendant's having paid money into court.

Lord KENYON said, that no such operation could be attributed to the paying the money into court; and the plaintiff was nonsuited.

Mingay and *Onslow* for the Plaintiff.

Garrow for the Defendant.

WHATELY

SITTINGS AFTER TERM AT GUILDHALL.

WHATELY *v.* MENHEIM and LEVY.

To establish a partnership between two defendants, a verdict on an issue directed out of a court of equity, to try whether the defendants were partners, and for what time, on a bill filed by one of them against the other, is admissible evidence to establish a partnership, the verdict having found them to be so.

ASSUMPSIT against the defendants for goods sold and delivered, charging them as partners, with the common counts.

Levy, one of the defendants, suffered judgment to go by default. *Menheim*, the other defendant, pleaded *non-assumpsit.*

The object of the present action was to establish a partnership between the two defendants *Levy* and *Menheim;* which was admitted by the former, but denied by the latter.

In Hilary Term, 1793, *Levy* had been arrested by *Menheim;* and being surrendered in discharge of his bill, he filed a bill in the exchequer against *Menheim* for an injunction and account, charging *Menheim* with being his partner.

The cause came on to be heard in *December*, 1795, when the court of exchequer directed an issue to try this question,— "Whether *Levy* or **Menheim* had been partners at any or what "time?" This issue was tried; and after a long trial there was a verdict found, "That a partnership had subsisted be- [*609] "tween *Menheim* and *Levy* from the 29th of *September*, 1791, "to the 22d of *January*, 1793." *Menheim* moved for a new trial; but it was refused.

The goods for which the present action was brought, had been furnished to *Levy* on the 26th of *November*, 1792, during the time which it had been found by the verdict that they had been partners.

In order therefore to establish the liability of *Menheim* on the ground of a partnership when the goods were sold, the counsel for the plaintiff offered in evidence the record of the verdict, so given in the court of exchequer on the issue directed for the purpose, finding *Menheim* to be a partner with *Levy* at the time of the goods sold.

It was strongly objected to by *Menheim*'s counsel, on the ground of the plaintiff in the present action having been no party to the suit in the exchequer; so that the verdict there given was *res inter alios acta.*

Lord KENYON said, he was of opinion that it was admissible and conclusive evidence of a subsisting partnership at the time of the goods sold, and that it could not properly be deemed a

matter

1798.

WHATELY v. MENHEIM and LEVY.

matter *inter alios acta*, both the defendants having been parties on the record in that suit, and it having been open to *Menheim* on that issue to rebut the idea of a partnership by every evidence he could offer.

Lord KENYON left it however to the jury, who found a verdict for the plaintiff.

Erskine, *Garrow*, and *J. Vaughan* for the plaintiff.

Mingay for the Defendants.

[610]

STITT v. WARDELL.

On a policy of insurance on a voyage, with liberty to touch at any port in her passage: if she is forced by stress of weather into any port, under that clause, she is not protected in breaking bulk while at such port; if she does, it avoids the policy.

CASE on a policy of insurance, dated the 20th of *August*, 1796, on the ship *Neptune*, at and from *Whitehaven* to *St. Michael's*, and from thence to her port or ports of discharge in the Channel, with liberty to sail to, touch and stay at any port or ports whatsoever on her passage out, particularly at *Cork*, without prejudice to the insurance.

The declaration then averred the loss to be by capture.

The plaintiff proved the policy, and that the vessel had sailed on her voyage on the 12th day of *September*, 1796: That she was by bad weather forced into the island of *Whitehorn*, in *Scotland*, where she continued ten days: That she again sailed, and meeting a second time with blowing weather, was forced into *Dublin*, where she continued three weeks.

The witness who proved these facts was the mate of the ship; and on his cross-examination he admitted, that while the ship remained in *Dublin*, she had broke bulk and sold a quantity of coals, with which she was partly freighted.

[611] Upon this appearing in evidence, Lord KENYON said the plaintiff could not recover under this policy. The policy was on a voyage from *Whitehaven* to *St. Michael's*, with liberty to touch at any port in her passage out; but that the liberty to touch at any port could never be extended to give him a liberty of trading at any such ports where she happened to touch, which in this case she had done; that would be to make the underwriters insure a voyage not in their contemplation, and to extend their liability far beyond what they proposed or insured against.

The plaintiff was nonsuited.

Law and *Holroyd* for the Plaintiff.

Erskine and *Park* for the Defendant.

1798.

PINKERTON v. ADAMS and MILNER.

PINKERTON v. ADAMS and MILNER. *Wednesday Dec.* 12.

The defendant, under the plea of the general issue, may give in evidence that the bill of exchange, on which the action is brought was indorsed after the indorser became a bankrupt; and is under no necessity of pleading that matter specially.

ASSUMPSIT by the plaintiff as indorsee of a bill of exchange for 189 *l.* drawn by *Ginger* on the defendants in his own favour; accepted by them, and indorsed by *Ginger* to the plaintiff.

Plea of *non-assumpsit.*

The defence relied upon was, that the indorsement had been made by *Ginger* to the plaintiff on the 9th of *November*, 1796, and that *Ginger* had become a bankrupt six days prior to the indorsement, namely, on the 3d of *November*, 1796.

The defendant first proved an act of bankruptcy committed by *Ginger*, on the 3d of *November*, 1796.

To prove the time then of the actual indorsement, *Ginger* was called; and being examined upon his *voir dire*, he admitted that he had given a counter-acceptance to the defendants to the amount of the bill.

[*612]

**Garrow* then objected to his competence, on the ground that, having given a counter-security to *Adams* and *Milner*, the defendants, he was interested in defeating this action, as he would thereby be discharged from his counter-security, which could only become absolute against him on the event of the defendant being compelled to pay the present bill.

Lord KENYON ruled, that the objection was sufficient, unless he was released.

He was accordingly released, and proved the indorsement to have taken place on the 9th of *November*.

This evidence being decisive in favour of the defendant, *Garrow* objected to its admissibility in its present shape, and contended that it should have been put on the record, and the defendant have pleaded that the bill of exchange upon which the action was brought, had been indorsed to the plaintiff by the person to whom it was payable after such person had become a bankrupt, and so could not be given in evidence under the general issue.

[613]

Marryat, on the same side, said, That when an infant had so indorsed a bill, there was a case in *Wilson* that said it should be so pleaded.*

Lord KENYON said, he was clearly of opinion, that it could be given in evidence under the general issue *non-assumpsit*, for

* I have searched for this, but can find no such case.

the

1798.

PINKERTON v. ADAMS and MILNER.

the defendant did not undertake to pay that to which the plaintiff had not a legal title; which was the case here.

Verdict for the Defendant.

Garrow and *Marryat* for the Plaintiff.

Gibbs for the Defendant.

NORTHEY and LEWIS (Assignees of LEYLAND and CRAGG) *v.* FIELD.

When goods are consigned, but the duties not being paid, are lodged in the King's stores, the consignor may stop them *in transitu* if he claims them before they are actually sold for the payment of the duties; or if sold, he is entitled to the proceeds.

THIS was an action of assumpsit brought by the assignees of *Leyland* and *Cragg* to recover the value of a quantity of wine.

The wines in question had been ordered the beginning of the year 1796 by *Leyland* and *Cragg*, who then carried on business as wine-merchants; and had been consigned to them, and a bill for 120*l.* drawn on *Leyland* and *Co.* and accepted by them; the bills of lading had been sent to *Thomson*, who was resident here, and who was partner with *Perry, Friend,* and *Nassau.*

By the excise law, twenty days are allowed after the ship arrives, to pay the duty, during which time the wines remain on board: if not paid within that time, they are removed into the King's cellars, during which time the owner may have them on paying the duty, warehouse-room, &c.; but if not then paid within three months, they are sold, and, after deducting the duties, the overplus is paid over to the owner.

Leyland and *Cragg* became bankrupts after the ship's arrival; but before the twenty days expired, and the duties not being paid, they were, on the 28th day of *July* last, removed into the King's cellars.

[614] The assignees petitioned to have the wines; and the solicitor to the customs was of opinion that they were entitled to them; but it was afterwards agreed that they should be sold.

The agent for the consignors, the day before the three months expired, also applied and endeavoured to get possession of them, but did not succeed; and they were sold on the 23d of *February*, 1797, at the King's stores, by public sale.

The wines produced 109*l.* after all deduction, which was paid over to the broker.

The plaintiffs contended that the goods had come to the bankrupt, so that the property was divested out of the consignors.

Lord KENYON said, he was of opinion that the plaintiffs

were

1794.

NORTHEY and LEWIS, (Ass. of LEYLAND and CRAGG) *v.* FIELD.

were not entitled to recover: the courts had of late years leaned much in favour of * the power of the consignor to stop his goods *in transitu;* it was a leaning to the furtherance of justice. Lord *Hardwick* had been of opinion, that in order to stop goods *in transitu,* there must be an actual possession of them obtained by the consignor, before they come to the hands of the consignee; but that rule had since been relaxed; and it was now held, that an actual possession was not necessary; that a claim was sufficient; and to that rule he subscribed. [*615] In the present case the bankrupt had no title to the actual possession till the duties were paid; until then they were *quasi in custodia legis;* before the sale, the agent for the consignors claimed, and endeavoured to get possession; that was a sufficient stopping *in transitu,* in his opinion, to secure the rights of the consignor.

The plaintiff asked for a case, which was granted; but it was, I believe, never afterwards moved.

Mingay and *Park* for the Plaintiff.

Gibbs for the Defendant.

Monday, Dec. 17th.

RICH *v.* PARKER.

Where a vessel is warranted the property of any neutral nation, she must have, at the commencement of the voyage, every paper or document required by the treaty between that nation and that at war with England; and this is so, though the capture has not been caused by the want of such papers.

THIS was an action on a policy of insurance on a ship called the *Atlantic,* on a voyage from *London* to *Guernsey,* from thence to the coast of *Africa;* during her stay there, and from thence to the *West Indies,* warranted *American* property.

The captain of the vessel was called upon to prove the loss. He stated that he had taken the command of her at *Guernsey,* another captain having had the command of her from *London.* That he had sailed from thence to the coast of *Africa,* where she was captured by a *French* privateer; and that while in possession of the privateer, she had got on a shoal and been lost.

He was asked, If he had any sea-letter on board? and where he had received it? He answered, that he had a sea-letter on board, which he had received at *Guernsey* from a Mr. *L'Merchant.* *

This sea-letter was thus explained:—By the treaty between *France* and *America,* ships of either nation are prohibited from sailing without a sea-letter or passport, containing the name, property, and bulk of the ship, &c. and such a description of [*616] her as should be sufficient to ascertain to what country she belonged and by the same treaty, if the ship sailed without such

with

1798. — Rich v. Parker.

sea-letter, she was liable to be captured by ships or privateers belonging to the other nation.

Erskine for the defendant stated his defence to be, that the ship was warranted to be *American* property: That to comply with that warranty, she must have commenced her voyage furnished with all the rights and protections belonging to an *American* ship: That the sea-letter was of that description, and that he was prepared with evidence to shew that the ship sailed from *London* to *Guernsey* without any sea-letter on board, it having been forwarded in a letter from *London* to the merchant in *Guernsey*.

The Plaintiff's counsel contended, that the capture and loss not having been occasioned by the want of the sea-letter, it was of no importance to the question whether she had sailed with or without one. The warranty was, that she was *American* property; and that fact was not disputed.

Lord Kenyon said, he was clearly of opinion the plaintiff was not entitled to recover. The ship should have had the sea-letter at the commencement of the voyage, as from the want of it she ran the risque of capture by the *French*; to which she would otherwise not have been subjected had she had the sea letter on board. Warranties were to be strictly taken, and should be true at the time of the commencement of the voyage. From the want of the sea-letter, the risque [617] was therefore increased. A vessel could not be said to be *American* property, which wanted one of its most important advantages, that of being protected from *French* cruisers. His Lordship was about to have the plaintiff called; but reserved the point on the application of the plaintiff's counsel.

Law, *Garrow*, and *Park* for the Plaintiff.

Erskine and *Giles* for the Defendant.

The case came on afterwards to be argued in the King's Bench; when the court agreed in opinion with the Lord Chief Justice.

Monday, Dec. 17th.

Sherriff v. Cadell.

If a plaintiff in trover, to establish a property, offers written evidence,

TROVER for a ship called the *Charming Molly*, against the defendant, who was a messenger under a commission of bankruptcy awarded against the plaintiff.

To prove the property of the ship to be in the plaintiff, he produced

1798.

SHERRIFF v. CADELL.

produced an original register, by which it appeared that the ship had belonged to one *Thorpe;* but there was an indorsement of the assignment to *Sherriff* the plaintiff, which was witnessed by two witnesses. Neither of the two witnesses were present; upon which *Erskine,* counsel for the plaintiff, was about to call another witness, to prove the possession of the plaintiff of the ship, and his paying for repairs, outfit, &c. relying on his possessory title only, when

which he fails in doing, he shall not be allowed to recur to and rely on a mere possessory title.

Garrow, for the defendant, objected to it, stating, That if the plaintiff had opened, and relied on his possessory title only, he might, perhaps, have put the defendant upon disproving it; but having produced the register, he had thereby proved a title out of himself, and in fact in Mr. *Thorpe;* and so having relied on written evidence, he should not now be allowed to recur to parol testimony, of a title founded in mere possession. [618]

It was answered, That if the production of the register was to be taken in evidence, it should be all taken together; and as the original register shewed the property to have been in *Thorpe,* by the same instrument (by the indorsement) an assignment of this property was proved to have been made from *Thorpe* to the plaintiff.

Lord KENYON said, It was true, that if a written instrument was produced, the whole should be taken together; but that was not the case here, for there was an assignment, which was a distinct instrument from the original register, and that witnessed by two witnesses, and should therefore be proved by them.

Erskine then contended, That under the register-act such evidence was not required, for that the statute did not require the party plaintiff to prove the property as stated in the original entry to have been so transferred; it was sufficient for him to prove possession, and to leave it to the defendant to disprove the regularity of the plaintiff's title, by referring to the regulations of the statute.

Lord KENYON ruled as before, that parol evidence of the plaintiff's title was inadmissible; for that the plaintiff having opened his case, and attempted to go into evidence of property through the medium of written evidence, which evidence too had in fact in some measure proved a title out of him, he should not be then allowed to recur to parol evidence to establish his title. [619]

The plaintiff was nonsuited.

Erskine, Gibbs, and *Ward,* for the Plaintiff.

Garrow and *Lawes* for the Defendant.

NEILSON

1798.

NEILSON v. DE LACOUR.

NEILSON *v.* DE LACOUR.

CASE on a policy of insurance on a ship from *Liverpool* to any of the *Windward* or *Leeward Islands*.

At the time the policy was effected, it was expected that the *French* islands in the *West Indies* would surrender to the *British* forces under Sir *John Jervis* and Sir *Charles Gray;* but that event had not taken place.

The ship arrived at *Dominica*, where one of the owners lived; but hearing that *Guadaloupe* had surrendered, she sailed there. Soon after *Guadaloupe* was retaken, and the ship captured.

[620] Lord KENYON nonsuited the plaintiff on his opening, on the ground that *Guadaloupe* could not be in the contemplation of the parties at the time the policy was effected.

Erskine and *Giles* for the Plaintiff.

Law for the Defendant.

END OF MICHAELMAS TERM.

CASES

ARGUED AND RULED

AT

NISI PRIUS,

HILARY TERM, 38 GEO. III.

SECOND SITTINGS IN TERM.

1798.

SPAWFORTH q. t. v. ALEXANDER.

Feb. 2.

A party, who on payment of a bill writes the word *Settled*, by way of receipt, is liable to the penalty under the act imposing a duty on receipts, if it is not stamped.

THIS was an action of debt, *qui tam*, on stat. 35 Geo. III. c. 55. § 7, for the penalty given by that act of parliament for giving a receipt on unstamped paper.

It was proved that one *Bliss* and defendant had been in the habits of dealing; that the defendant furnished the following bill to *Bliss*:

		l.	s.	d.
To Tea . .		1	15	0
To —— . .		0	17	0
	£	2	12	0

That payment being demanded, *Bliss* paid the money, and desired a receipt; upon which the defendant, for a receipt, wrote "settled" on the bill, and put his initials; and there was no stamp on it whatever.

[622]

It was contended, that this was not a receipt within the meaning of the act.

Per Lord KENYON. It is not necessary to have a receipt given in any specific terms, it is sufficient if it purports to be a discharge, and is intended to operate as such. Any form of words

1798. — SPAWFORTH q. t. v. ALEXANDER.

words which, if duly stamped, would operate as a receipt, is to be considered liable to the stamp duty.

Verdict for the plaintiff for one penalty.

Mingay and *Lawes* for the Plaintiff.

Garrow for the Defendant.

Feb. 2.

MICHELOTTE *v.* DILLON.

The operation of the alien bill does not prevent the bringing of actions by aliens to recover money due to them; it only prevents its being sent out of the kingdom.

[623]

ASSUMPSIT on a promissory note made by the defendant in the year 1785, to secure the payment of 6000 livres by instalments.

It was stated, as a defence to the action, that the plaintiff was in *Paris* at the time the note was given; had come over here for the purpose of suing, but with an intention to return; and it was contended, that under the alien bill, 34 Geo. III. c. 9, the plaintiff could not recover.

It is by the first section of that act enacted, "That if any "person residing in *Great Britain* shall, after the first day of "*March*, 1794, and during the war, knowingly and wilfully "pay, either by payment or remittance, any bill of exchange, "note, &c. to and for the use of any person or persons who on "the first day of *January*, in the year of our Lord 1794, were or "was, or at any time since has, or hath been, within the do-"minion of *France*, such person shall be guilty of treason." Then follow other prohibitory clauses.

Garrow for the plaintiff. The policy of the act was to prevent *British* money from getting into the hands of the enemy; but it never meant to restrain the bringing of actions for the recovery of the money which might never go out of the kingdom after it had been recovered. By the 6th clause it may be exported by a licence; *et non constat* but a licence may in the present case be obtained. In fact, this point has been ruled by your Lordship in the case of the Messrs. Thellussons; when it was held that the operation of the act went only to the transmission of the money from this country, not to its recovery here.

Lord KENYON. By the 7th section of the statute it is enacted, "That if any action shall be commenced or prosecuted "for the recovery of any debt or demand, contrary to the pro-"visions of the act, it should be lawful for the court, or for a

"judge,

"judge out of term, to discharge the defendant arrested on "mesne process, and to stay all further proceedings in such "action or suit upon such terms as shall appear necessary to "enforce the provisions of the act." This is decisive of the present objection. If the party is arrested, a judge has a power of discharging the defendant; but it does not put an end to the action. If it was so, it might cause the greatest injustice, as by the party's being prevented from suing, the statute of limitation might attach. The policy of the statute is sufficiently answered by stopping the money from going out of the kingdom, without carrying the restraints of the statute further.

Verdict for the Plaintiff. [624]

Garrow and *Plowden* for the Plaintiff.

Gibbs for the Defendant.

PHILLIPS, Gent. v. JANSEN.

It is not actionable to say of an attorney, "I have taken out a summons to tax his bill—I shall bring him to book, and have him struck off the roll." *Aliter*, to say "He deserves to be struck off the roll"—A libellous letter addressed to the party himself, is not actionable.

THIS was an action for words, with a count for a libel on the plaintiff.

The declaration stated that the plaintiff was an attorney; and the libel, as well as the words, were laid as written and spoken of him as an attorney, and actionable as referring to his profession.

The facts of the case, as proved on the part of the plaintiff, were these: The plaintiff had been employed as attorney to one *Neate*, to sue the defendant for a debt due to him. The defendant consented to pay the debt and costs. He received the plaintiff's bill of costs; but considering it as exorbitant, he sent the amount of the debt and costs, accompanied with a *letter, to the plaintiff, to the following effect: "I have sent "you the money; but I desire to have a bill, in order that I "may have it taxed, to show the world how villainously you "have conducted yourself." This letter was the lible charged in the declaration. [*625]

The words proved were, "I have taken out a judge's war-"rant to tax *Phillips's* bill: I'll bring him to book, and shall "have him struck off the roll."

Lord KENYON ruled these words not to be actionable. His Lordship added, "Had the words been 'He deserves to be "struck

1798.

PHILLIPS, Gent. *v.* JANSEN.

"struck off the roll,' they would have been actionable; but "here they were spoken only with reference to the over-"charge in the bill."

The plaintiff proved the defendant's hand writing to the letter, and the delivery to him.

On this evidence, *Mingay*, for the defendant, objected: that the manner in which the supposed libel was proved to have been published, was not actionable. He admitted that it might be the object of an indictment, as tending to incite the plaintiff to break the peace; but that the libellous matter being contained in a private letter, addressed to the plaintiff himself, and only delivered into his own hands, was not that publication which the law required to constitute a libel upon which an action could be maintained. To make a private letter a libel, it must be addressed to a third person, not to the party himself, otherwise no action could be maintained.

Lord KENYON assented that the law was as stated; and the plaintiff was nonsuited.

Erskine and *Bayley* for the Plaintiff.

Mingay for the Defendant.

[626]

SITTINGS AFTER TERM, AT WESTMINSTER.

Tuesday, Feb. 13th.

LECHMERE, Esq. *v.* HAWKINS, Gent.

If a creditor borrows money of his debtor, for which he gives a security, this shall not prevent him from setting off the debt due to himself, even though he expressly promised to pay the sum lent to him by his debtor.

ASSUMPSIT on a promissory note for for 30l. made by the defendant, and payable to the plaintiff.

Plea of *non-assumpsit*, with a notice of set-off.

In the summer of the preceding year, the defendant having been in *Scotland* upon business, where the plaintiff then resided, and being in want of money, applied to the defendant for the loan of the sum he wanted. Prior to this period, the defendant had been concerned for the plaintiff, as his attorney; and the plaintiff was then considerably in his debt. It was stated for the plaintiff, that the defendant had promised to pay this money so lent, notwithstanding the defendant was then his debtor; and letters were produced in evidence from the defendant to the plaintiff, wherein he promises to pay the money

money the plaintiff had so lent him, and for which the note had been given, without taking any notice of the debt the plaintiff then owed, or affecting to set one demand against the other.

Upon this evidence *Erskine*, for the plaintiff, contended, that the defendant could have no benefit of his set-off. In that case, where a creditor borrowed money of his debtor, under an express promise to pay it, it bound him under every circumstance to the absolute payment; nor could his undertaking be satisfied by setting off the debt against his own demand.

Lord KENYON said he knew no such law, nor did he think there was any such legal obligation on the creditor: it might be an honorary obligation, and such as a man who gave it ought to observe: but if he thought fit not to consider such an obligation as binding, he could not compel him. There were mutual subsisting demands at the time of the action brought, and such as the statutes of set-off gave the party-defendant power to set against the plaintiff's demand. Besides this, if he was to refuse the set-off here, it would drive the defendant into a court of equity, where the judgment obtained here would be set off against the debt admitted to be due by the plaintiff to the defendant. He therefore over-ruled the objection, and admitted the defendant to go into evidence of his set-off.

The cause was referred.

Erskine Adam and *'Espinasse* for the Plaintiff.

Mingay for the Defendant.

[628]

THRUPP v. FIELDER.

Saturday, Feb. 17.

To bind an infant to the payment of a debt contracted during his infancy, and for which he would not be liable without a new promise, there must be an express pro-

ASSUMPSIT for goods sold and delivered.

Pleas, 1, General issue, and, 2, Infancy.

Replication to the second plea. "A new promise made by the defendant since he had come of full age, and before the plaintiff exhibited his bill," and issue thereon.

The action was brought to recover the amount of a coachmaker's bill.

In support of this replication, upon which issue had been joined, the plaintiff could prove no express promise whatever

to

1798.

THRUPP v. FIELDER.

mise to pay.—Paying money generally, on account of the bill, is not sufficient.

to pay, but gave in evidence a payment of 40*l.* made by the defendant, on account of this bill, since his coming of age.

Adam for the plaintiff, contended, that this payment being made generally on account of the bill, was an admission by the defendant of his liability to pay, and tantamount to a new promise.

Lord KENYON. I am of opinion this is not such a promise as satisfies the issue. The case of infancy differs from the statute of limitations: in the latter case a bare acknowledgment has been held to be sufficient. In the case of an Infant I shall hold an acknowledgment not to be sufficient, and require proof of an express promise to pay, made by the infant after he has attained that age when the law presumes that he has discretion. Payment of money made, as in the present case, is no such promise. The plaintiff, if he has no other evidence, must be called.

[629]

Gibbs, for the defendant, then said, that the plaintiff must have failed on another ground on this issue; for that in fact the defendant had come of age the day *after* the plaintiff had commenced his action; so that he could not have promised to pay *after* he came of age, and *before the plaintiff* had exhibited his bill:—to which Lord KENYON assented.

The Plaintiff was nonsuited.

Adam and *Best* for the Plaintiff.

Gibbs and *Pitcairn* for the Defendant.

Saturday, Feb. 17.

LACAUSSADE *v.* WHITE.

Where money has been deposited on an illegal wager, it may be recovered back from the winner, after the wager has been lost.

THE declaration in this case stated, "That, in consideration, the plaintiff had on the 11th day of *January*, in the year of our Lord 1797, paid the defendant the sum of 100*l.* he agreed to pay to the plaintiff the sum of 300*l.* if articles forming the basis of a peace, and signed by official characters, by which hostilities would cease, and would not recommence, were not settled between *England* and *France* on or before the 11th of *September* 1797," with the usual money counts.

Plea of *non-assumpsit.*

The 11th of *September*, 1797 being passed, and the wager lost, the object of the present action was to recover the sum of 300*l.* the amount of the sum lost.

Upon

Upon the opening of the case, Lord KENYON asked the plaintiff's counsel if the wager in question was not of the description of those which could not support an action, as being contrary to the policy of the state.

1794.

LACAUSSADE v. WHITE.

Garrow, for the plaintiff, admitted the force of his Lordship's objection, that the special count for the amount of the wager could not be maintained; but contended, that he could recover the 100*l.* paid by him in the count for money had and received.

Gibbs, for the defendant. This is an illegal transaction, and *in pari delicto potior est conditio defendentis;* the illegal contract here is executed, and the wager lost. Had it been executory, the plaintiff might have recovered back his money; but having taken his chance to win, he shall not now be allowed to recover back his stake after he has lost. The point was so decided in *Lowry* v. *Bourdieu, Dougl.* 467.

Lord KENYON. Lord HOLT held, that money paid under circumstances similar to the present, could be recovered back; I am decidedly of the same opinion. If the contract was *malum in se*, it could not be recovered back; but this is a question turning on a matter of public policy: The court have allowed this action in a variety of instances, particularly in the case of boxing-matches.

Gibbs asked to have the point reserved; which was granted.

A verdict was therefore taken for the plaintiff for 100*l.* with liberty for the defendant to move to set it aside, and have a nonsuit entered.

Garrow, and *Eben. King* for the Plaintiff. [631]

Gibbs, Heath, and *Drew* for the Defendant.

In the next term *Gibbs* moved accordingly; when the court refused the rule, agreeing with the direction of the Lord Chief Justice.

Vide *Allen* v. *Hearn*, 1 Term Rep. *Cotton* v. *Newland*, 5 T. Rep. 405.

LAST

LAST SITTINGS IN TERM, AT GUILDHALL.

Brown v. Turner.

February 13.

Omnium is stock before the scrip-receipts are issued, upon which the statute prohibiting stock-jobbers attaches, so as to make contracts respecting it void. If a bill is given for payment of differences on a stock-jobbing transaction, it is not recoverable by an indorsee who has become so after the bill became due.

ASSUMPSIT on a bill of exchange by the plaintiff, as indorsee against the defendant the acceptor.

Plea of the general issue.

The case in evidence was, that the defendant having been engaged in several stock-jobbing transactions, had employed one *Pritchard* as his broker. Upon a speculation on the stock called *Omnium*, a loss having happened, *Pritchard* paid the differences for the defendant, and then drew the bill in question in his own favour on him for the differences which he had so advanced; and the defendant accepted it. *Pritchard* did not sue on the bill, but suffered it to remain in his hands till it was over-due, and then he indorsed it to the plaintiff for a debt he owed him.

[*632]

*Upon this evidence the defendant's counsel relied, that the statute against stock-jobbing (7 Geo. 2, chap. 8.) having declared all contracts respecting stocks, in the nature of wagers, to be void, this bill could not be recovered by *Pritchard*, the original payee against the defendant; and that being the case, and the indorsement having been made to the plaintiff after the bill became due, the acceptor was let into every legal defence against the indorsee which he had against the original payee of the bill; so that in his hands also it was void.

It was answered by the plaintiff's counsel, that *omnium* was not stock, and of course, that securities given on account of it were not void; for that at the time of this transaction the loan had only been voted, but the scrip-receipts were not in the market; and the statute speaks of joint stock or public securities, which mean public securities then subsisting. That this bill was therefore not void in *Pritchard's* hands; but that even if it had, it came within the principle of the cases of *Faikney* v. *Reynous*, 4 Burr. 2069, and *Petrie* v. *Hannay*, 3 T. Rep. 418: that security given for money lent to be applied to the payment of

of differences, even on a stock-transaction which was illegal, was valid in law. 1794.

Brown v. Turner.

Lord Kenyon said, he was of opinion that *omnium* was clearly stock, within the meaning of the statute which was levelled against gambling generally in the public funds: and as to the validity of the bill in the hands of the plaintiff, he conceived that point to have been settled in a case decided some time ago, that the bill was not given for money lent to pay defendants but for the defendants themselves. (*Steers* v. *Lashly*, 6 Term Rep. 61, was the case alluded to by his Lordship.) He therefore allowed the objection; but at the instance of the plaintiff's counsel, made a note of it. A verdict was taken for the defendant. [633]

In the next term *Garrow* moved to set it aside; but the court of K. B. concurred in opinion with the judges ruling, and refused the application.

Garrow and *Marryatt* for the Plaintiff.

Gibbs for the Defendant.

SITTINGS AFTER TERM, AT GUILDHALL.

Moody v. Surridge.

Wednesday, Feb. 10.

Malt is corn, within the meaning of the clause in the policies of insurance, "to be free from average," &c.

ASSUMPSIT on a policy of insurance.

The insurance was on a quantity of malt, shipped on account of the plaintiff.

It was agreed, that the loss was an average loss only.

The defendant relied on the clause in the policy of insurance, "That corn, fish, &c. are to be free from average, unless general, or the ship be stranded;" and that this being an average loss, he was therefore not liable.

For the plaintiff it was contended, that malt did not come within the meaning of the term corn, in the policy of insurance, it being in a manufactured state.

Lord Kenyon said, that the usual clause in policies of insurance to be free from average losses was, that underwriters should not be subjected to trifling losses in the case of articles [634]

 insured

1794. MOODY v. SURRIDGE.

insured, which were of a perishable nature;—corn was of that description; but that it more strongly applied to the case of malt, which was certainly corn, though in a manufactured state, but which was of a still more perishable nature. He was therefore of opinion, that this loss came within the exception of the policy, and that the defendant was discharged.

The jury were of the same opinion, and found a verdict for the Defendant.

Garrow and *Park* for the Plaintiff.

Erskine and *Gibbs* for the Defendant.

CASES

ARGUED AND RULED

AT

NISI PRIUS,

EASTER TERM, 38 GEO. III.

THIRD SITTINGS IN TERM.

DOE ex dem. EYRE *et alt.* v. LAMBLY.

May.

Where a tenant on being applied to respecting the commencement of his holding, informs the party that it begins on a certain day, and notice to quit on that day is given at a subsequent time, he shall be bound by the information he so gave, and not be permitted to shew that in fact it began at a different time.

THIS was an action of ejectment, brought to recover the possession of a grass farm at *Tottenham.*

The title of Lessor of the plaintiff was as landlord of the premises, against the defendant as the tenant.

The plaintiff proved the holding by the defendant, and notice to quit at *Lady-day.*

The defendant denied that his term commenced at *Lady-day,* and relied on the insufficiency of the notice to quit.

In order to support his case and the notice, the plaintiff gave in evidence, That the lessor of the premises had been a lunatic; and on his death they had been advertised to be sold. Mr. *Corfield* was attorney for the executors of the lunatic, and had been employed by them to sell them. Previous to their being advertised, Mr. *Corfield,* in order to ascertain what interest he had to sell, and how the premises were circumstanced, applied to the defendant *Lambly,* who was then the tenant in possession, to know what term he had in them, and when his holding commenced;

1794.

Doe ex dem. Eyre et alt. v. Lambly.

commenced; when the defendant informed him of his interest, and that his term commenced at *Lady-day*.

*Lord Kenyon intimating an opinion, that this was sufficient,

Garrow, for the defendant, said, that he was instructed that he could incontestibly prove that the premises were not held from *Lady-day;* and asked his lordship to say, whether, in case [*636] he could prove that the information given to Mr. *Corfield* had been by mistake, it would enable him to go into evidence to shew the holding was not from *Lady-day?*

Lord Kenyon said, that he was of opinion the defendant had concluded himself by the information he had given to Mr. *Corfield*, and that he could not now set up a holding from a different day; and that it made no difference whether the information so given proceeded from mistake or design, as it had equally the mischief of leading the landlord into an error, and inducing him to proceed to recover the possession of the term, the commencement of which he had taken from the defendant's own information.

The Plaintiff recovered.

Erskine and *Holroyd* for the Plainitiff.

Garrow for the Defendant.

[637]

SITTINGS, AFTER TERM, AT WESTMINSTER.

Watson *v.* Threlkeld.

May.

If a man allows a woman to use his name, and pass for his wife, he shall be bound to pay for goods furnished to her, even by a man who knew that the parties were not married.

ASSUMPSIT for goods sold and delivered. Plea of *Non-assumpsit.*

The action was brought to recover the amount of a quantity of linen drapery goods, furnished by the plaintiff to a woman who passed for the wife of the defendant.

The plaintiff proved the delivery to the woman at the defendant's lodgings: that he had himself chosen some of the articles for her: that she used his name; and was called Mrs. *Threlkeld* in his presence.

The defendant relied, that in fact this woman was not his wife, though she lived with him as such, but was a kept woman; and that that circumstance was known to the plaintiff when the

the goods were furnished. It was then pressed by the defendant's counsel, that however it had been held, that if a man permitted a woman to use his name, and pass for his wife, he thereby subjected himself to the payment of her debts; it had only gone to those cases where the tradesmen had not known the real situation of the parties, but believed the woman to be actually married: that it was meant as a punishment on the man, who, by permitting a woman to use his name, had thereby given her a false credit, derived from his situation in life, as passing for his wife; but, in the present case, no such deceit was practised, no such false colours held out. The plaintiff knew the defendant was not married; so that he could not look to his credit, but to the woman's own; and that the plaintiff should therefore be nonsuited.

1794.

THRELKELD.

[638]

Lord KENYON. It is certain, that if a man has permitted a woman, to whom he was not married, to use his name and pass for his wife, and in that character to contract debts, he is liable for her debts; and, I am of opinion, that he is liable, whether the tradesman who furnished the goods knew the circumstances to be so or not. He gives her a credit from his name and cohabitation; and it is not to be supposed that the tradesman could look to the credit of a woman of that description, and not to that of the man by whom she was supported. I shall hold the credit to be given to him, and that he is liable.

What, however, added his Lordship, I have said, must not be taken to be the case of a common strumpet, who may assume the name of a person, without his authority, from having casually known him; it must be where the man permits the woman to assume his name, where she lives in his house, and is part of his family.

The Plaintiff had a verdict.

Erskine and ——— for the Plaintiff.

Mingay for the Defendant.

SITTINGS

SITTINGS AFTER TERM, AT WESTMINSTER.

May 29.

Where money has been paid under a written agreement, but which agreement the party is unable to perform, the other may maintain an action for money had and received generally, and is not bound to declare on his special agreement.

Farrer v. Nightingal.

ASSUMPSIT for money had and received. Plea of *Non-assumpsit.*

Defendant being possessed of a public-house, the plaintiff entered into a treaty with him, for the sale of his interest; and a written agreement was accordingly entered into between the plaintiff and the defendant, which recited, That the defendant was possessed of an interest in a public-house, of which eight years and a half were to come; and that the plaintiff had contracted and agreed for the purchase of the interest and good-will of the same, for a certain sum of money therein mentioned.

The plaintiff paid a deposit of 5*l.* to the defendant, on signing the agreement; but, afterwards, upon looking into the defendant's title, it appeared, that he had an interest to come in the premises of but six years only; and not of eight and a half, as stated in the agreement. Upon which the plaintiff refused to accept of the assignment, and brought the present action to recover his deposit of 5*l.*

[640] *Garrow*, for the defendant, objected: That as there had been a written agreement between the parties, the plaintiff should have declared on it, and should not be permitted in this action to go into parol evidence of the matters contained in it; which matters were necessary to the support of the plaintiff's action.

Lord Kenyon. I have often ruled, that where a person sells an interest, and it appears that the interest, which he pretended to sell, was not a true one; as for example, if it was for a lesser number of years than he had contracted to sell, the buyer may consider the contract as at an end; and bring an action for money had and received, to recover back any sum of money he may have paid in part performance of the agreement for the sale: and though it is said here, that upon the mistake being discovered in the number of years of which the defendant stated himself to be possessed, he offered to make an allowance *pro tanto*, that makes no difference in the case. It is sufficient for the plaintiff to say, That is not the interest which

I

I agreed to purchase. The plaintiff's action is well brought. The Plaintiff had a verdict.* 1794.

FARRER v. NIGHTINGAL.

Erskine and *Peake* for the Plaintiff.

Garrow for the Defendant.

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* BERRY v. YOUNG.

Sittings after *Michaelmas*, 1788.

THIS was an action for money had and received.

Plea, *Non-assumpsit.*

The action was brought to recover back the deposit-money paid by Plaintiff, who was the purchaser of an annuity sold by the defendant (an auctioneer) at a public aution.

One of the conditions of sale was, That a good title should be made out by the 10th of *July*. In the beginning of *July* the plaintiff called on the seller of the annuity to shew him the title-deeds; but he, not having them in possession, gave him an abstract of the title, which did not contain any of the deeds. [641]

Bearcroft suggested, that application ought to have been made to the vendor at an earlier period, in order to enable him to get the deeds by the 10th of *July*.

Lord KENYON. A seller of an estate ought to be prepared to produce his title-deeds at the particular day. A court of equity indeed will, under particular circumstances, enlarge the time; but then those circumstances, entitling him to such indulgence, must clearly appear; which is not the case in this instance. It is however objected, that the plaintiff had no right to the possession of those deeds; but though he had no right to keep them, he had a right to inspect them. A court of equity would have obliged the vendor to give attested copies of the deeds at his own expense, with an undertaking to produce them thereafter at the vendee's expense, for the support of his title. As the seller, therefore, has here failed in completing his engagement, the plaintiff is entitled to a return of his deposit-money.

The Plaintiff had a verdict for 280*l.* his deposit.

O'CONNOR v. CHARTER.

Same day.

If defendant justifies in an action of false imprisonment, under a writ out of the Exchequer, reciting an information against the plaintiff, for penalties incurred under the Lot-

THIS was an action of trespass and false imprisonment.

Plea of Not Guilty.

The plaintiff proved, that he had been arrested by the defendant, under process directed to apprehend a person of the name of *Stephen Kemble;* and had been detained in custody for a fortnight, when he was liberated.*

The defendant was a sheriff's officer; and the defence relied on was, That exchequer process had issued to arrest a person of the name of *Stephen Kemble,* for offences under the Lottery Act: That, in fact, the plaintiff was the person meant; he having [*642]

1794.

O'CONNOR v. CHARTER.

tery Act, the information itself must be produced, and must appear to be prior to the writ.

having assumed the name of *Stephen Kemble*; and for that purpose the defendant proposed to prove, that the plaintiff was well known by that name; and had executed the bail-bond, wherein he was described by the name of *O'Connor*, sued by the name of *Stephen Kemble*.

To prove the legality of the arrest, and that it was done under exchequer process, grounded upon penalties incurred by the plaintiff under the Lottery Act, the defendant produced the writ and the warrant directed to him; which stated the information against the plaintiff in the exchequer, and the penalty of 500*l*. incurred under the Lottery Act.

The plaintiff's counsel objected to this, for insufficiency; as the information itself ought to be produced, upon which the process had issued.

It was answered, That this being an action of the defendant, as an officer, that the production of the writ was a sufficient justification for him.

Lord KENYON ruled, that the information itself ought to be produced.

The information was then produced, and appeared to be of Hilary Term, 38 *Geo.* III.; but, upon referring to the warrant, it was found to be dated the last day of the *Michaelmas* preceding, 28th of *November* 1797.

This was objected to, as fatal.

[643] The defendant's counsel contended, that it was similar to the case of common process in the court of King's Bench, which always supposed a bill to be previously filed; but which in fact was not done till after the process was returned, and so was immaterial.

Lord KENYON called for the writ, and observed, That it recited a previous information upon which it was founded: it derived its validity from such prior information; and which information the defendant was bound to produce. Here the information offered in evidence was subsequent to the writ; and the process therefore could not be said to be founded on it. If the defendant could not produce an information prior to the writ, the defendant had failed in proving his justification, and the plaintiff must have a verdict.

The defendant having no farther evidence, the plaintiff obtained a verdict.

Erskine and *Lawes* for the plaintiff.

Garrow and *Maryatt* for the Defendant.

DRAGE

1794.

DRAHE v. IBBERSON.

DRAGE v. IBBERSON.

A note given for compounding a misdemeanour, may be recovered at law.

TROVER for a promissory note.

The defendant was a tailor; the plaintiff, a person who kept a shop for the purchasing and sale of remnants of cloth.*

In the month of *February* preceding the action, an apprentice of the plaintiff's had, without his master's knowledge, taken up a quantity of cloth at the defendant's woollen-draper's, which he had sold at the plaintiff's shop at an under price, and converted the money to his own use. The matter being discovered, the defendant and the woollen-draper, accompanied by a constable, went to the house of the plaintiff, and charged him with the fraud. He confessed the circumstances; and, to induce the defendant not to proceed further in the business (as his counsel stated it, he then ignorantly supposing that he had been guilty of a crime) had the goods valued; part he paid in money, and gave the promissory note in question for the rest. The present action was brought to recover back that note which he had, as it was stated, been ignorantly induced to give. [*644]

The note was drawn by one *Davernethey*, payable to the plaintiff by name; but not to his order. It was, however, indorsed *Thomas Drage*.

Mingay contended, That the plaintiff had, by the indorsement, transferred all property in the note; and so could not maintain the action.

Lord KENYON. The note is not payable to the plaintiff's order; he therefore cannot transfer any property in it by his indorsement.

The plaintiff's counsel contended, That the defendant, having taken the note for compounding a felony, had obtained an illegal possession of it; and therefore the plaintiff was entitled to recover the possession.

Lord KENYON. In the case of *Ogleby* v. ———, in the time of Lord *Talbot*, a distinction is taken between a security given for compounding a felony and settling a misdemeanour. In the latter case, the security is not void, or contrary to law. In the case of stolen goods, the receiver is an accessary. This is not a felony, though very near it: it is like the obtaining goods on false pretences. But if a felony, it cannot be so till the principal is convicted. [645]

Marryatt

1794.

DRAGE v. IBBERSON.

Marryatt, of counsel for the plaintiff, cited the case of *Collins* v. *Blantern*, 2 *Wils*. 341; and said, That in that case the distinction between the consideration being the compounding a felony and settling a misdemeanor, was over-ruled; and that it was there held, that if the consideration was the latter, it was as bad as the former.

Lord KENYON said, That he should adhere to the class of cases which held, that the consideration being the settling a misdemeanour, might be good in law; and that there was therefore no ground for the plaintiff's recovery in the present action.

Gibbs, for the plaintiff, acquiesced; and the plaintiff was called.

Gibbs and *Marryatt* for the Plaintiff.

Mingay for the Defendant.

Vide *Fallowes* v. *Taylor*, 7 Term Rep. 475; where it was adjudged, that a bond given to a person, conditioned to be void, if the obligor should not commit certain nuisances, the obligee agreeing not to prosecute him for nuisances already committed, was held to be good.

[646]

CALVERT v. ARCHBISHOP of CANTERBURY.

An entry made in the books of the plaintiff, specifying the terms of an agreement, is not evidence, where the person who made it is dead, by proving his hand-writing.

THIS was a special action on the case, on an agreement for the hire of a pair of coach-horses.

The declaration stated the agreement between the plaintiff and the defendant for the hire of the horses for twelve months; and the action was brought to recover the hire for that time.

The defendant had returned the horses at the end of nine months.

The plaintiff's servant, by whom the contract had been made, was dead; and the only evidence of the commencement of the contract was, an entry made in the plaintiff's book, which stated the terms of the agreement. This entry, *Garrow*, for the plaintiff, contended, was competent for him to give in evidence, to prove the commencement of the contract; relying on the case of *Price* v. Lord *Torrington*, *Salk*. 285; wherein it was resolved, that entries made in his master's book, by a servant,

vant, of the delivery of beer, were evidence after the servant's death, upon proving his hand-writing. 1794.

Calvert v. Archbishop of Canterbury.

Lord Kenyon. I think this evidence inadmissible. The cases in which an entry made by a servant, in the books of his master, have been received in evidence, are where, by such entry, the servant charges himself, and discharges another person. Such entries may be read, not only to charge the servant but for other purposes: as where a steward of a manor enters in his book the receipt of rents. Such book may not only be read to charge the steward with the amount, but to shew, on behalf of the tenants, that such rents had been received; and also to shew, in cases in which it might become a question, what kind of rents was payable out of particular estates. That rule does not apply in the present case. The entry here is not to charge the servant. [647]

The plaintiff was nonsuited.

Garrow and *Reader* for the Plaintiff.

Erskine for the Defendant.

Maddocks v. Hankey.

The admission by an indorser of his hand-writing, is evidence against the maker.

ASSUMPSIT by the indorsee of a promissory note against the maker.

The promissory note was drawn by the defendant, payable to one *Sellier*, who indorsed to *Rymer*, by whom it was indorsed to the plaintiff.

The plaintiff proved the hand-writing of the defendant and *Rymer*, by persons acquainted with them; and the only doubt in the case was, as to the hand-writing of *Sellier*.

The evidence to establish the fact was, of a person who had gone to *Sellier*, he then being in prison, and asked him if that was his hand-writing. To whom he acknowledged that it was.

Gibbs, for the defendant, objected to this evidence; insisting, that such an admission of a fact was not evidence against the defendant, as it might be material to ascertain the time when the indorsement had been made. [648]

Lord Kenyon said, he thought it was admissible and sufficient

1794. — MADDOCKS v. HANKEY.

cient evidence, as it went in derogation of the party's own title to the note; but he offered to reserve the case.

The Plaintiff had a verdict.

Erskine and *Manley* for the Plaintiff.

Gibbs for the Defendant.

LAST DAY OF SITTINGS AT WESTMINSTER.

GARLAND v. SCOONES.

The *postea* is evidence of a verdict for the sum indorsed, and is good evidence of a set-off to the extent of it.

DEBT on bond.

Pleas:—*Non est factum*; 2. Set-off.

The bonds upon which the action was brought was, a bond given by the defendant to the Lord Chancellor, on suing out a commission of bankruptcy against the plaintiff in the common form, conditioned to establish the usual requisite to make the plaintiff a bankrupt, &c. which he had not done.

[649]

The bond, when produced, was in a penalty of 200*l.*; and one of the conditions was to establish a debt of 200*l.*

It was objected: that this bond was not within the statute.

Per Lord KENYON. That depends on the number who were to join. If there was but one petitioning creditor, it seems not to be good.

The objection appearing on the record was waived.

To prove the set-off, the defendant produced the record of a verdict on a trial, wherein the present defendant had been plaintiff in an action against the present plaintiff, in which he had obtained a verdict for 245*l.* The *postea* was so indorsed; and it was relied, that it was evidence of a demand more than sufficient to cover the plaintiff's demand; and the case of *Baskerville* v. *Brown*, before Lord *Mansfield*, 2 *Burr.* 1229, was cited.

Gibbs, for the plaintiff, contended, That the mere production of the *postea* was not of itself sufficient evidence; that the judgment ought to be proved.

Lord KENYON ruled, that the mere production of the *postea* was sufficient to establish the demand to the extent of the sum indorsed, as the verdict in the cause. His Lordship added, that,

that, in cases of issues out of Chancery, the Chancellor always admitted the production of the *postea* as conclusive of the extent of the demand.

The set-off more than covering the amount of the plaintiff's demand, the defendant had a verdict.

Gibbs and *Praed* for the Plaintiff. [650]

Law and *Dampier* for the Defendant.

Vide contra *Bull.* N. P.

REX v. HAMMOND PAGE.

THIS was an indictment against the defendant for perjury.

The indictment stated, " That issue was joined in a certain cause, wherein ——— was plaintiff, and ——— the defendant; which issue came on to be tried at the Sittings, &c. before a jury of the country, &c. and which was afterwards referred, &c. and that defendant, &c. committed wilful and corrupt perjury," &c.

The counsel for the prosecution produced the *nisi prius* record, which stated the issue joined, and the award of the jury process; but there was no *postea* indorsed. The cause having been referred, the Associate had made no indorsement; but *Mingay* offered the parol evidence of the officer, to prove that the cause had come on to be tried, and the rule of court to prove the reference of the cause; contending, that this was the best evidence; because the jury, having given no verdict, there was nothing to indorse on the *postea*.

Erskine, for the defendant, contended, That whether such trial was had or not, could only appear by matter of record; that is, by the indorsement of the *postea*: and notwithstanding the reference, the *postea* ought to be indorsed. That the jury was sworn; and either that a juror was withdrawn, or a verdict taken for the plaintiff, subject to the reference.

Lord KENYON, at first, said, he was of opinion that these proceedings must be proved by the record, and not by parol evidence; but he thought the *postea* might be so indorsed now in court. In civil cases, it was common to allow indorsement in court of notes or bills, or alterations in blank indorsements, to answer the facts of the case; and he knew no difference between civil and criminal cases, where there were materials to amend; and that he had known instances of amendment from the office's notes, at a great distance of time. However, on reading the allegation in the indictment, " that the cause came on to be tried before a jury of the country," &c. &c. he thought it would be too much to say, that the whole *postea*, with the name of the jurors, and that one thereof, viz. " the last sworn, was withdrawn from his fellows," &c. should then be indorsed; but that the whole facts should be proved by the record. But what was conclusive, that when so indorsed, it could not [651] be given in evidence in another cause without being stamped; though it was not usual to stamp it on making it up.

The defendant was acquitted.

BIGG,

1794.

BIGGS, Assignee of FISHER v. SPOONER.

June 5.

A trader, who is not denied to his creditors calling for money; who sees them, and pretends to go out to get money, but does not return, nor endeavours to get money, making it only a pretext, commits thereby an act of bankruptcy.

BIGG, Assignee of FISHER, v. SPOONER.

TROVER for a quantity of household furniture and stocking frames.

The action was brought to recover the articles mentioned in the declaration, on the ground of their having been assigned to the defendant, who was a *bona fide* creditor, after an act of bankruptcy alleged to have been committed by the bankrupt.

The assignment, to the defendant of these articles, was dated in *April*, 1798. Some few days after its execution, an indisputable act of bankruptcy took place; but the plaintiff relied on acts of bankruptcy committed during the course of the three preceding months, in the following manner:—

Fisher, the bankrupt, had been an attorney at *Sheffield*, in considerable practice. He had been in the habit of receiving sums of money from different persons, to lend out on securities; in many of which he had himself joined, and thereby became considerably involved. Being anxious to avoid committing what he deemed a clear act of bankruptcy, that of being denied to a creditor, he gave orders to that effect—never to be
[652]
denied, if at home, when a creditor called. But it was given in evidence, that, during the months of *January*, *February*, and *March* preceding, when he was known to be in difficulties, several persons called, to whom he was indebted: they were admitted to his house, and he saw them; but upon their asking him for money, he pretended to go out to get it; and left his house under that pretence, leaving them there, expecting his return; but he never returned during the course of the evening. Several, after waiting several hours, departed with threats of arresting him; and during the time of his absence, it was proved, that he went either to the billiard-table or tavern; where he was found by his clerks or servants when they went to seek him.

Lord KENYON, upon this evidence, was of opinion, that though he had not been denied, these were acts of bankruptcy, as delaying creditors; and so directed the jury, who found a verdict for the Plaintiff.

Erskine, *Gibbs*, and *'Espinasse* for the Plaintiff.

Law and *Manley* for the Defendant.

1798.

BOUERMAN v. RADENIUS.

A letter or admission by the plaintiff on the record, is evidence against him, even though the plaintiff is only nominal, and another is the party really interested.

BOUERMAN v. RADENIUS.

THIS was an action on the case, brought to recover damages for an injury done to a quantity of clover-seed which had been shipped by the plaintiff, on board the defendant's ship, on account of *Vandyke* and *Co.*

The defendant was the captain of a vessel trading between *Embden* and *London;* and the charter-party was produced, signed by both the plaintiff and the defendant.

The action was in case, and the declaration stated, "That by a certain bill of lading, entered into between the plaintiff and the defendant, the defendant, in consideration that the plaintiff had shipped on board the defendant's vessel, then lying in the port of *Embden,* certain goods, to be carried from thence to *London;* there to be delivered in good condition and dry (except in case of inevitable damage or leakage) for a certain reasonable freight to be therefore paid; the defendant undertook to deliver them accordingly." The declaration then averred the shipping of the goods, &c. and assigned a breach, that the goods were not delivered dry and in good condition; but wetted and spoiled through the neglect of the defendant.

The plaintiff proved that the goods had been received in a spoiled and damaged state; and attempted to establish, that the injury had proceeded from the want of their being properly dunnaged when the vessel was loading.

The defence was, That the injury arose from bad weather; [654] and that every possible care had been taken, as well in the stowage and dunnage, as after the sailing.

To prove these facts, the defendant offered in evidence a letter, written by the plaintiffs, and addressed to *Vandyke* and *Co.* to whom they were agents, and their names being only used in the action, as the bill of lading was in their names.

This letter was in the following words:—"We hear you are proceeding against *Radenius* for neglect of the seeds: we can assure you that we, as well as *Radenius,* acted in no improper manner. He dunnaged his hold uncommonly high. The ship sprung a leak at sea, and not in the river; and it seems to us, from the steps you are taking, that you are wishing to make the poor captain pay for the loss of the market. Captain *Radenius* acted in every respect according to order; we can lay no fault to his charge, nor think there has been any defect in his duty.

"*C. Bouerman and Co.*"

1798.

BOUERMAN v. RADENIUS.

This letter also disclosed, that the real interest was in *Vandyke* and *Co.* and not in the plaintiffs, who were indemnified by *Vandyke* and *Co.*

This letter was contended, by the defendant's counsel, to be decisive, as furnishing a complete answer to the plaintiff's case; and that he should be nonsuited.

The plaintiff's counsel contended, That this letter, as evidence, was totally inadmissible. They stated, that it appeared [655] by the letter itself, that the plaintiff, upon this record, had no interest whatever in the question: That *Vandyke* and *Co.* were the parties really interested, having indemnified the plaintiffs: That they should therefore not be affected by any act of the plaintiffs on the record, nor prejudiced by any admission of theirs: That the Court had, in many instances, taken notice of the real plaintiff in the action; though another appeared on record and allowed pleas, which otherwise could not have been pleaded:* That it appeared the plaintiffs stood in the relation of agents only to *Vandyke* and *Co.*; and as the letters of an agent would not have been evidence in favour of his principal, they should not be evidence against him.

For the defendant it was answered, That if this evidence was not admitted, it might be productive of the highest injustice; inasmuch as the real party interested, by bringing an action, not in his own name, but in that of his agent, would deprive the other party of the benefit of his testimony; and yet would claim to himself all the benefit of being a real plaintiff: or the defendant might lose the benefit of a set-off against the real party. Besides, *Vandyke* and *Co.* having admitted *Bouerman* and *Co.* to be their agents, and of course empowered them to act for them in that capacity, in the shipping and stowing of the goods, if they were satisfied with the manner in which it had been done, *Vandyke* and *Co.* could not complain; but be bound by the acts of their agents.

[656] Lord KENYON. I cannot look out of the record on which *Bouerman* and *Co.* appear as the plaintiffs. I am desired to go out of it, and to consider *Vandyke* and *Co.* as the plaintiffs, and *Bouerman* and *Co.* as no way interested; and this for the purpose of rejecting what appears to me to be a fair and proper answer to the case. Sitting in a court of law, I must judge by the record that is before me; and *Bouerman* and *Co.* are the

* Vide *Bottomley* v. *Brooke*, and *Winch* v. *Keely*. 1 Term Rep. 619.

plaintiffs

plaintiffs. Every admission by the plaintiff is evidence for the defendant; nor should he be deprived of the benefit of it, by setting up a supposed interest in a third person, though the effect of such party, being the plaintiff on the record, is to deprive the defendant of his evidence. The evidence appears to me admissible, and the defendant entitled to a verdict.

The Plaintiff was nonsuited.

Gibbs and *Park* for the Plaintiff.

Erskine, *Garrow*, and *W. Walton* for the Defendant.

In the next term, the plaintiff's counsel moved to set the nonsuit aside: but, after argument, the court concurred in opinion with the Lord Chief Justice; and a new trial was refused. [7 Term Rep. 663. S. C.]

In the course of the argument a case was cited by Mr. *Erskine*, before Lord *Mansfield*; to which the court seemed to assent. An action was brought in the name of a nominal plaintiff, by persons beneficially interested, for whom he was trustee. At the trial, the defendant produced a release from the plaintiff; which Lord *Mansfield* held to be conclusive, but said, That the court of chancery, upon application, would make [657] the trustee pay the principal debt, if well founded, and the costs of the suit.

Vide *Craib* et Ux. v. *D'Aeth*, in *notis*, 7 Temp. Rep. 670.

SITTINGS AFTER TERM, IN THE COMMON PLEAS.

QUICK and WIFE, Executor of M'PHERSON, v. STAINES, Knt. Sheriff of London.

If a woman, possessed of effects which were her husband's who is dead, uses them as her own, and after marries, and her second husband also uses them, it

THIS was an action of trover against the defendant, as surviving Sheriff of *Middlesex*, to recover the value of a quantity of household goods which had been taken by him in execution.

The goods in question had been the property of one *M'Pherson*: he died, leaving his widow executrix; and she, soon after his death, married the plaintiff *Quick*. The widow had kept possession of the goods after his death, and used them as her own

1798. own; and continued so to do, until after her marriage with the plaintiff *Quick;* and the goods appeared as his to the world.

QUICK and WIFE, Executor of M'PHERSON, *v.* STAINES, Sheriff of *London.*

*The execution in question, issued against *Quick;* under which the goods were seized. They were claimed by the plaintiff, as the unadministered goods of *M'Pherson;* but not being restored, the present action was brought, after a notice given to the Sheriff.

is a *devastavit;* and they are liable to an execution at the suit of the second husband.

Shepherd, Serjt. upon these facts, contended, that it appeared, that a *devastavit* had been committed, by the executrix giving up the goods to her husband *Quick;* and permitting him to appear as the owner, without taking any step to dispose of them, according to her duty under the will: that that, there-

[*658] fore subjected them to an execution against the plaintiff *Quick.*

For the plaintiff it was answered, that the possession of the goods, as it appeared in evidence, was consistent with the plaintiff's title. An executor might advance to the value of the testator's goods of his own money and retain them; so that possession was no evidence either way. No positive act of ownership, exercised by the plaintiff *Quick,* was given in evidence; the goods were merely permitted to remain where they had been at the time of *M'Pherson's* death: and this being a question of property, and the property being directly proved to belong to the testator's estate, it could not be taken under an execution at the suit of another, on a presumptive charge of such property.

EYRE, Chief Justice, said, he was of opinion, the plaintiff should be nonsuited: that it appeared the defendant Mrs. *Quick,* had, after the death of her first husband, taken the goods into her possession; and so continued, without making any disposition of them till her second marriage, when the same possession continued, and was extended to the husband.

[659] The mere act of intermarriage did not amount to a *devastavit;* but when the goods of the first husband come into the hands of the second, in consequence of his intermarriage with the widow, and he was permitted to use them, and appear as the owner, and to have full power to dispose of them, this was such a conversion of the property as should prevent him or his wife from denying a *devastavit;* or a property derived from such a conversion, as against a creditor. The plaintiff was nonsuited; but with liberty to move to set it aside.

Le Blanc and *Clayton,* Serjts. and ——— for the Plaintiff.
Shepherd, Serjt. for the Defendant.

In

In the next term a motion was made to set aside the nonsuit, and *Farr* v. *Newman*, 4 Term. Rep. 621 was cited; but the Court agreed in opinion with the Chief Justice. [*Bos.* and *Pull* Rep. in C. P. 293. S. C.]

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QUICK and WIFE, Executor of M'PHERSON, v. STAINES, Knt. Sheriff of *London*.

WALKER v. CONSTABLE.

Where a contract for the sale of land has been abandoned, and an action brought for the deposit, and the plaintiff declares on the special circumstances, and states the contract, he must prove it to have been a valid one, by a note in writing, even though the sale was by auction.

THIS was a special action on the case. The declaration stated, That whereas the plaintiff and defendant had contracted for the sale of certain premises of the defendant, at and for the sum of ——*l.*; and had *paid thereon a deposit of 850*l.* And whereas also the plaintiff had incurred and been put to a considerable expense in examining the title, &c. to the premises in question; and then reciting, that the plaintiff and defendant had agreed to put an end to the contract for the intended purchase, and to receive back the purchase-money. The declaration averred, That the defendant undertook to pay interest for the deposit-money, from the time of its being advanced to the time of its being repaid; and also all costs and expenses incurred in examining and investigating the title, &c.

There was another count for money had and received.

It appeared that the premises had been sold by auction.

The Plaintiff was proceeding to prove his case by parol, when an objection was taken, that such evidence could not support the declaration: that the foundation of the action was an agreement for the sale of lands or tenements; which contract it was necessary should be a valid and legal one, or this action could not be sustained: that in order to make such contract good and legal, it should, under the statute of frauds, be in writing; and if not, the contract was void. [*160]

Adair, Serjeant, for the plaintiff answered, that it appeared that the premises had been sold by auction: that it had been settled in *Simon* v. *Motivos*, 3 *Burr.* 1721, that sales by auction were not within the statute; but, that secondly, the contract having been abandoned, that it was competent for the plaintiff to shew that it had been to the effect stated in the declaration, and now abandoned, and at an end, without producing the instrument itself, which had no longer any effect or operation.

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WALKER v. CONSTABLE.

EYRE, Chief Justice. The plaintiff cannot proceed without production of the contract. The defendant's objection is a strictly legal one: the foundation of the action is the contract for the sale of the premises; which contract, in order to be valid, the statute of frauds requires that it should be in writing. It is said, that this being a sale by auction, is not within the statute; and the case of *Simon* v. *Motivos* is relied on: but that case does not apply. That was a case on the sale of chattels; it arises under a distinct clause of the frauds. This is a question on the sale of lands, and is not governed by that case; and I am of opinion that such contract is void, if there is no note in writing of it produced.—The plaintiff's counsel further rely, that, being abandoned, they may go into parol evidence of it; but its existence, and the terms of it, must be proved before it can be proved to be abandoned; and upon that it is sufficient to say, That, being in writing, the instrument itself must be produced; and parol evidence of it is inadmissible. The plaintiff must be called.

In the next term *Adair*, Serjeant, moved to set the nonsuit aside, and to enter a verdict for the plaintiff; but the court agreed in opinion with the Chief Justice. In this cause, as [662] reported by *Bosanquet* and *Puller*, another point was made in the case: [*Bos.* and *Pull*, Rep. in C. P. 306. S. C.] Whether, under the count for money had and received, the plaintiff could not recover the interest of the money; but the court held, That under the general count for money had and received, the plaintiff could only recover the net sum received without interest.

Vide *Stansfield* v. *Johnson*, *ante* 101.

END OF EASTER TERM.

CASES

ARGUED AND RULED

AT

NISI PRIUS,

IN THE

KING'S BENCH.

TRINITY TERM, 38 GEO. III.

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Hawkins, Adm. *v.* Blewitt.

Wednesday, July 4.

To give effect to a *donatio mortis causâ*, the deceased must, at the time of the supposed gift, part with all dominion over them.

TROVER for a box containing money and wearing apparel, brought by the plaintiff as administrator of one *Hollowell*, deceased.

The defendant pleaded the general issue, and relied on his right to hold the property as a *donatio mortis causâ* from the deceased.

The case, on the part of the plaintiff was, that the intestate in his last illness ordered the box to be carried to the house of the defendant, who was his aunt, and to be delivered to her; but gave no other directions respecting it, nor said any thing [622] about giving it to her. But it was farther given in evidence, that, on the next day, the key was brought to the intestate, who desired it to be taken back, saying, that he should want a pair of breeches out of it.

Gibbs, for the defendant, stated, that he was prepared with evidence to shew, that early in life the intestate had been distressed and in difficulties, from which he had been in some degree extricated, and otherwise was under considerable obligations

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tions to the defendant, to whom he always expressed his sense of them, and declared his intention of leaving her whatever property he should die possessed of. He then contended that having thus intimated a forgone intention, the delivery of the box, in this manner, must be presumed to be made in pursuance of it, and be sufficient to establish her title to the property.

Lord KENYON. I should be glad to give effect to the intention of the intestate, if it could be done consistently with the rules of law; but I am of opinion here, the defendant's title cannot be supported. In the case of a *donatio mortis causâ*, possession must be immediately given. That has been done here; a delivery has taken place; but it is also necessary that by parting with the possession, the deceased should also part with the dominion over it. That has not been done here. The bringing back the key by her the next morning to the intestate, and his declaration that he should want one of the articles of his apparel contained in it, are sufficient to shew that he had no intention of making any gift or disposition of the box. It seems rather to have been left in the defendant's care for safe custody, and was so considered by herself.

The plaintiff had a verdict.

[665] *Garrow* and *Eb. King* for the Plaintiff.

Gibbs for the Defendant.

SITTINGS AFTER TERM, AT GUILDHALL.

Friday, July 13.

MARSH v. COLLNETT.

Copies from the transfer books of stock are good evidence.

CASE for money had and received.

To prove the transfer of a parcel of stock by the plaintiff to the name of the defendant, the plaintiff's counsel offered in evidence a copy of the transfer, taken from the bank-book of the 3 per cents.

The bank-books were in court, but the copy above mentioned was only offered in evidence.

Gibbs, for the defendant, objected to it, and contended that the books themselves were the best evidence, and should be given in evidence, and that a copy was inadmissible.

Lord

Lord KENYON said, they were public books, which public convenience required should not be removed from place to place; and though the books were in court, he would not, for the sake of example, break in upon a rule founded on that principle of public convenience, and require the production of the original, but admit a copy from them in evidence. His Lordship added, he remembered a case before Mr. Justice *Yates*, where a deed of thirty years being produced in evidence, it appeared that the subscribing witness was living, and then actually in court. That learned Judge ruled, that he would not break in upon a rule of evidence so well established, as that deeds of thirty years standing proved themselves, by requiring the subscribing witness to be called, but would admit it without further proof.

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MARSH v. COLLNETT.

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Erskine, *Garrow*, and *Manley* for the Plaintiff.

Gibbs and *Marryatt* for the Defendant.

HAMMERSLEY et. alt. *v.* KNOWLES, Esq.

July 15.

When a debtor makes a payment generally, without directing the appropriation, it shall be taken to be a payment on account of the subsisting debt, and on no other account.

ASSUMPSIT on a promisory note for 800*l.* made by the defendant, and drawn payable to *Nathaniel Jefferys*, or order, and by him indorsed to the plaintiffs.

Jefferys, the payee of the note, had been a jeweller, and kept cash with the plaintiffs as his bankers. Having provided the jewels for the marriage of the Prince of *Wales*, to the amount of 55,000*l.* the necessary advances on that occasion having involved him in difficulties, the *defendant, who was his brother in-law, had lent him the note in question for his accommodation.

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In *February*, 1797, *Jefferys* paid the note in question, together with two others, into the plaintiffs' house as his bankers: on the 27th of that month these notes were due. Previous to that time *Jefferys* informed the plaintiff, that the note in question was an accommodation note, and requested him to hold it, and the other, over for some time, until his demand on account of the Princess of *Wales*'s jewels was settled. *Hammersley* consented; and on the 27th of *February*, *Jefferys* paid into the house 2000*l.* and said he would pay the balance when he received the rest of his money from the Prince's trustees; and also leave such a sum in their hands as would repay them for the

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the favour done to him. This balance was then 302 *l.* The money appeared to be paid in generally, and nothing was said as to its particular appropriation at the time. The plaintiffs carried this payment generally to account. *Jefferys* some time after became insolvent, and the plaintiffs now sought to recover on this note, in order to cover the deficiency in the balance due by *Jefferys* to the house.

For the defendant it was contended, that the payment made by *Jefferys*, on the 27th of *February*, should have been appropriated to the payment of the debt then subsisting, and of course to the discharge of the present note, together with the others, in specie, then laying unpaid in the banker's hands, as far as the money paid in would go; and that therefore the utmost that could be recovered against the defendant, or the makers of the other notes, would be the 302 *l.* the balance then unpaid by the 2000 *l.*

[668] Lord KENYON. The grounds of the law as to payments are very clear. Where a person pays money on one account, it must be so appropriated, and cannot be changed: but the rule is not so strict as to say that the appropriation must be made at the time the payment is made; it may be done at a future time, in pursuance of a foregone transaction: but where there is a subsisting demand between two parties, and the debtor makes a payment generally, it would be too much to say it was not a payment, but a deposit. It does not appear to me that it can be so taken, unless the parties agree that it should be so. That this was not so taken by the plaintiffs themselves appears, because it appears that after *Jefferys* became insolvent, *Hammersley* applied to him to set the note in question to the account of the general balance: I therefore think, that as the subsisting debt on the 27th of *February*, when *Jefferys* paid in the 2000 *l.* on account, arose on the note in question, and the two others mentioned in the case, the plaintiff was bound to ascribe it to that account.

The jury found a verdict for 302 *l.* only.

Garrow and *Lawes* for the Plaintiff.

Erskine for the Defendant.

IN

IN THE COMMON PLEAS.

SITTINGS AFTER TERM, AT WESTMINSTER.

HILL v. WRIGHT.

Under the issue of *riens en arrere* in replevin, the plaintiff cannot controvert the holding as claimed by the defendant in his avowry.

THIS was an action of replevin.

The defendant, by his avowry stated, That the plaintiff held of him certain premises, the rent whereof was reserved quarterly; and then avowed for a quarter's rent in arrear to *Christmas*, 1797.

Plea in bar to the avowry. "No rent in arrear."

The counsel for the plaintiff stated his case to be, That he held under a lease from the defendant's father, under whom the defendant claimed; which lease he had ready to produce; but in which the rent was reserved half-yearly, and not quarterly, as the defendant had avowed.

Mr. Justice BULLER. The plaintiff cannot go into that evidence on these pleadings.

Shepherd, Serjeant, contended, That it could: That the issue was, That there was no rent in arrear on the day stated in the avowry. No rent was by law due till the days on which it was reserved and made payable; and by the lease, those days were *Michaelmas* and *Lady-day*; so that no rent was in arrear at *Christmas*, on which day the defendant avowed, no rent being then due or payable.

BULLER, Justice. *Riens en arrere* admits the title of the defendant as stated in the avowry. The holding therefore, must be taken to be an holding, reserving the rent quarterly. The plaintiff might have, by his plea in bar, denied the holding. He has not done so, but chosen to take issue only on no rent being in arrear at *Christmas*, 1797. Unless, therefore, he can shew that he has paid the rent up to that time, the defendant must have a verdict. [670]

The plaintiff having no evidence to that effect, the defendant had a verdict.

Shepherd, Serjeant, and *'Espinasse* for the Plaintiff.

Le Blanc, Serjeant, for the Defendant.

SITTING AT GUILDHALL.

SECOND SITTINGS IN TERM.

WEBB v. HERNE and WILLIAMS, Sheriffs of Middlesex.

In an action against the sheriff for an escape, the allegation "that the defendant was held to bail under and by virtue of an affidavit," the affidavit must be produced, and the indorsement on the writ is not sufficient of it.

THIS was an action against the Sheriff for an escape. The declaration was in the common form, stating the issuing of the writ, which was indorsed to hold the defendant to bail for 10*l.* "under and by virtue of an affidavit then on record," &c.

The defendants had notice to produce the writ, which not being done, the plaintiff's attorney proved the issuing of such a writ as was stated in the declaration.

The plaintiff's counsel were then proceeding to prove his case, without producing the affidavit to hold to bail, stated in the declaration.

This was objected to by the counsel for the defendant, who relied that it was a distinct substantive and material allegation which ought to be proved.

It was answered for the plaintiff, That it was not necessary to be proved; for, that by shewing the issue of the writ, [which writ was in the defendant's possession and not produced; but on which, had it been produced, the indorsement on it would have sufficiently established the fact] the evidence was sufficient to support the allegation.

[672] EYRE, Chief Justice, said, that the writ would not sufficiently prove the declaration, even had it been produced: That the averment respecting the affidavit, was a substantive and material averment, which could only be supported by evidence of the affidavit itself.

The plaintiff not having any evidence of the affidavit, was nonsuited.

Shepherd, Serjeant, and *Lawes*, for the Plaintiff.

Cockell, Serjeant, for the Defendant.

In the next term [*Bos* and *Pull.* Rep. C. P. 292.] *Shepherd*, Serjeant, moved to set aside the nonsuit; but the Court of Common

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WEBB v. HERNE and WILLIAMS, Sheriffs of Middlesex.

Common Pleas concurred in opinion with the Chief Justice. But Mr. Justice BULLER said, That the production of the affidavit to hold to bail had, in some cases, been held to be unnecessary; but it was where the declaration only stated, "That the defendant had been arrested by virtue of a writ *indorsed for bail in L——*," without stating the words mentioned in the declaration in the present case, upon which the question arose—*ideo quære?*

Vide *Croke* v. *Dowling*, East. 22 *Geo.* III. *Buller, N. P.* 14, last edit. *Rogers* v. *Ilscombe*, *Taunton Lent* Ass. 1785. '*Esp.* Gig. *N. P.* 535. *Savage, q. t.* v. *Smith*, 2 *Blackstone's* Rep. 1101. *Bristow* v. *Wright* and *Pugh. Dougl.* 640.

GARMENT v. BARRS.

[673]

A warranty that a horse is sound is not false, because the horse labours under a temporary injury from an accident.

THIS was an action on the case, on the warranty of a mare sold by the defendant to the plaintiff.

The declaration stated, "That in consideration that the plaintiff, at the special interest and request of the defendant, had bought of him a certain mare of great value, the defendant undertook and promised the plaintiff that she was sound," &c.

The first witness, called on the part of the plaintiff, proved the sale, and that at the time, the defendant warranted her to be sound. But he said further, that upon the plaintiff then observing that she went rather lame of one leg, the defendant said, that that had been occasioned by her taking up a nail at the farrier's; and, except as to that lameness, she was perfectly sound.

Le Blanc, Serjeant, objected: That the plaintiff should be nonsuited on the ground of a variance. He observed, that the plaintiff had declared upon a warranty in general terms, that the mare was sound, whereas the warranty proved in evidence was with an exception of the lameness of the foot. This he contended was a fatal variance.

EYRE, Ch. J. A horse labouring under a temporary injury, or hurt, which is capable of being speedily cured or removed, is not for that an unsound horse; and where a warranty is made that such a horse is sound, it is made without any view to such an injury; nor is a horse so circumstanced an unsound horse within the meaning of the warranty. I am of [674]

opinion

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opinion, that to make the exception such as ought to have been stated in the declaration, as a qualification of the general warranty, so as to make a fatal variance between the warranty really made and that stated in the declaration, the injury the horse had sustained, or the malady under which he laboured, ought to be of a permanent nature and not such as arose from a temporary injury or accident.

The plaintiff had a verdict.

Shepherd, Serjeant, and *'Espinasse*, for the Plaintiff.

Le Blanc, Serjeant, for the defendant.

END OF TRINITY TERM.

CASES

CASES

ARGUED AND RULED

ON THE

HOME CIRCUIT.

SUMMER ASSIZES, 1798, AT MAIDSTONE.

CORAM LORD KENYON AND MR. JUSTICE BULLER.

The KING *v.* WATTS.

1798.

Where a vessel was sunk in a navigable river, by accident or misfortune, an indictment cannot be maintained against the owner for not removing it.

THIS was an indictment against the defendant, preferred by the city of *London*, for a nuisance on the river *Thames*.

The indictment charged, "That the defendant, being the owner of a certain ship which had been sunk in the river *Thames*, suffered and permitted the said ship to remain and continue there, to the obstruction of the navigation of the said river, and of persons passing, repassing, and navigating on the said river," &c.

The case, as stated by the prosecutor's counsel was, That the defendant's ship coming up the *Thames* was run down and sunk by an outward bound *Indiaman;* that she became a complete wreck, in which state she was at the time of the indictment, and had the effect complained of in the indictment.

Upon the opening of the case, Lord KENYON expressed his [676]
opinion that the indictment could not be sustained. His Lordship said, that the grievance which was the object of the present indictment, had been occasioned, not by any default or wilful misconduct of the defendant, but by accident and misfortune; and that it would be adding to the calamity to subject the party to an indictment, for what had proceeded from such

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such causes, against which he could not guard, or which he could not prevent.

Shepherd, Serjeant, for the prosecution, contended, That though the defendant was not punishable for causing the nuisance, it having arisen from the accident stated, it still was his duty to have removed it, and that he was therefore liable for not having done so.

Lord KENYON said, That perhaps the expense of removing the vessel might have amounted to more than the whole value of the property; he was therefore of opinion that the offence charged was not of that description for which an indictment could be supported, and he therefore directed an acquittal.

Shepherd, Serjeant, the Common Serjeant, *Silvester*, and *Knowlys* for the Prosecution.

Palmer, Serjeant, and *Pitcairn* for the defendant.

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DOE on dem. T. JOLLIFFE, J. JOLLIFFE, and WM. BOWERMAN v. SYBOURN.

The counts in a declaration in ejectment, need not so correspond with the notice to quit so as to make it necessary, where there are several lessees, who sign the notice to quit, that there should be a joint demise by all.

EJECTMENT for Premises at *Lewisham*.

The Defendant claimed under a lease made in the year 1798, by one *Pym*, then a mortgagee in possession.

Bowernan, the lessor of the plaintiff, was heir to the mortgagor, and had been let into possession under a decree of the Court of Chancery, upon a bill filed by him for an account, and for redemption, in the year 1790; under which decree, *Sybourn* the defendant, who was then tenant in possession, was ordered to attorn.

T. Joliffe and *J. Jolliffe*, were trustees.

The ejectment was brought on the ground of the lease made by *Pym* to the defendant being void, and of course considering the defendant as a tenant at will (*vide ante* 496).

Sybourn, the defendant, had attorned tenant on being served with the order.

The plaintiff proved the notice to quit. It was signed by *Thomas Graham*, attorney for *T. Jolliffe* and *J. Jolliffe*, and for *Wm. Boverman*.

There were four counts in the declaration; all on the demises

mises of *Jolliffes* or *Bowerman*; but none on the joint demise of *Jolliffes* and *Bowerman*.

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Doe on dem. T. Jolliffe, J. Jolliffe, and Wm. Bowerman v. Sybourn.

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**Runnington*, Serjeant, for the defendant, objected to the notice as insufficient. He contended, that some count in the declaration ought to correspond with the notice. The notice in this case was in the names of three, as jointly concerned in an interest; whereas all the counts in the declaration in ejectment were on the several demises of the *Jolliffes*, or of *Bowerman*.

Lord Kenyon said, that the notice ought to be signed by all persons having title to the premises; and if the notice was so, however the counts might distribute the interest, he was of opinion it made no difference, and that the declaration was good.

It appeared in evidence, that after the defendant *Sybourn* had attorned tenant to *Bowerman*, under the order of the Court of Chancery, *Bowerman* had accepted rent.

This was contended by the counsel for the defendant to be an affirmance of the lease.

Lord Kenyon said he was of that opinion, and nonsuited the plaintiff.

Shepherd, Serjeant and *Trebeck* for the Plaintiff.

Runnington, Serjeant, *Palmer*, Serjeant, and *Bailey*, for the Defendant.

SAME CIRCUIT.

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AT GUILDFORD, CORAM BULLER, JUSTICE.

Jebb *v.* Povey.

In an action for obstructing a water-course, a person claiming a right to the use of the water-course is an inadmissible witness.

TRESPASS for breaking and entering the plaintiff's close, called the *Ditch*, in the parish of *Egham*, in the county of *Surry*; and breaking down and subverting the soil, &c.

The defendant pleaded, "That she was possessed of an ancient messuage; and that, from time whereof the memory of man was not to the contrary, a certain stream or water-course did run and flow, and had been accustomed to flow, from

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from a certain close in the parish of *Egham*, in the occupation of one *A. Mackison*, near to the plaintiff's close, and to the extremity of the *locus in quo*, towards the south, and along the said place called the *Ditch*, and adjoining to the defendant's messuage; and prescribed for a right to have the use and benefit of part of the said water, for the use of her said messuage; and the occupation thereof; and then, because the said plaintiff diverted the course of the said water-course, and obstructed it in the said close called the *Ditch*, so that she [680] could not have the benefit of the said water-course nor remove the obstruction without entering the said close, justified the supposed trespass," &c.

The plaintiff traversed the course of the water-course, as stated in the defendant's plea, and issue was joined on the *traverse*.

The case, as it appeared in evidence, was, That there were several cottages adjoining to the defendant's cottage; to each of which belonged a well, or dipping place, which were supplied with water, for the use of their houses, from the stream in question.

The defendant contended, that the water had been used to flow for the supply of those several wells from time immemorial. And the plaintiff, on the other hand, insisted, that the usual and natural course of the water was down the ditch; (the *locus in quo*) and that the owner of the soil of which he was seised, had only suffered and permitted the water to flow by the end of the ditch to the houses of the several cottages.

To prove that the ancient and immemorial course of the water was as stated in the plea, the defendant called one of the occupiers of those cottages.

He was asked, on his *voire dire*, If he did not consider himself as entitled to the benefit of this stream of water, in the same way as it was claimed by Mrs. *Povey* the defendant? He answered in the affirmative.

The plaintiff's counsel then objected to his competence; as he came to support a right to a watercourse, by which (if the defendant succeded) he would be benefited. They insisted it was like the case of commoners, where, if the question to be [681] tried is a general right of common, a commoner is not a competent witness; though it is otherwise where common is claimed by prescription, in right of a particular estate. They said, that, in the present case, the witness came to support a claim

claim of a general right to this watercourse in which he was interested, and not merely to establish the defendant's case, but the course of the stream itself, that in fact being the issue; and the verdict in this case would be the evidence to establish it.

It was answered, by the defendant's counsel, that the verdict here could not benefit the witness; it was *res inter alios acta*. The question was, Whether the defendant was entitled to that right by prescription? The house of the witness lay below that of the defendant. It did not follow, that because the defendant had a right to the water, that the witness had it also.

BULLER J. It is certain, that if the record in this case can be given in evidence, in an action brought by the witness, to try the same right to this water-course, the witness is incompetent. I am of opinion that it can. The issue in this case is not on the right of the defendant, claimed as belonging to the messuage occupied by her; it is on the course of this stream according to a particular description set forth in the pleadings. The distinction put by the plaintiff's counsel is the right one. If the right of common is claimed by *all* the customary tenants, one is not a witness for the rest; but it is otherwise if it is claimed as belonging to a particular messuage. The question here is, to ascertain a general right claimed by all the persons occupying the cottages; I therefore think the witness not competent.

The plaintiff had a verdict.

Shepherd, Serjeant, *Garrow*, and *Bailey* for the Plaintiff. [682]

Adam and *Marryat* for the Defendant.

CASES

ARGUED AND RULED

AT

NISI PRIUS,

MICHAELMAS TERM, 39 GEO. III.

SITTING-DAY AFTER TERM AT GUILDHALL.

1799.

A warrant issued to arrest a person on a bill found for a misdemeanour, and to have him at the next session, is not *functus officio* after the session expires; but the party may be taken up at any time.

MAYHEW *v.* HILL *et alt.*

THIS was an action of assault, and for false imprisonment. Two of the defendants pleaded not guilty. *Hill*, the other defendant, pleaded specially a justification, to the following effect:—That on the 21st day of *January*, in the year of our Lord 1797, a certain warrant had issued under the hand and seal of the Lord Chief Justice of *England*, directed to his tipstaff, and all other constables, &c. reciting, That it had been certified that at a General Session of Oyer and Terminer for the city of *London*, on the 11th of *January*, 1797, the plaintiff stood indicted for wilful and corrupt perjury. To which indictment he had not appeared, or pleaded; and then ordering all persons, to whom the warrant was directed, to apprehend the plaintiff; to bring him before the Lord Chief
[684] Justice, if taken in or near the cities of *London* or *Westminster*; or, if elsewhere, before some of the Justices of such place, that he might become bound, with sufficient sureties, for his personal appearance at the *next Session of Oyer and Terminer* to be holden for the city of *London*, to answer the said indictment, and to be further dealt with according to law. The defendant then justified that the warrant was put into his hands

hands as a constable, to be executed; by virtue of which he took the plaintiff, *quæ est eadem transgressio*, &c. 1799.

MAYHEW v. HILL et alt.

The case, on the part of the plaintiff was, that he had been arrested under this warrant, in the month of *July*, on a *Sunday*; and his counsel contended, that the warrant being to arrest the plaintiff, in order to have his personal appearance at the *next Session* of Oyer and Terminer, after the lapse of several sessions which had intervened between the issuing of the warrant and the apprehension of the plaintiff, the warrant had expired; and the arrest was illegal.

Lord KENYON said, the warrant had not expired. There was no return on a warrant on a day certain. Its force depended on the arrest of the defendant. It might happen, that the party was out of the way, and could not be met with; but the warrant was not for that reason at an end. He might be arrested at any time.

The plaintiff was nonsuited.

Garrow and *Manley* for the Plaintiff.

Gibbs, *Dampier*, and *Gurney* for the Defendant.

In the next term a motion was made by Mr. *Garrow* for a new trial, on the ground above taken; but the Court agreed with Lord KENYON. Vide 8 Term Rep. [685]

SITTINGS AFTER TERM, AT WESTMINSTER.

CRUDEN v. FENTHAM.

THIS was an action for negligently driving the defendant's chaise, by which the plaintiff's horse was killed.

The case in evidence was, the defendant was returning to town in a one-horse chaise, with his family, from *Tooting* in *Surry*. He was driving on the wrong side of the road. The plaintiff's servant was on horseback, going from *London*. The road was of very considerable breadth, so that the servant could have passed without any difficulty; but he, without any reason, but conceiving it to be the right of the road, crossed over to the side where the chaise was driving, that being the right side of the

1799.

CRUDEN v. FENTHAM.

the road; and, in endeavouring to pass between the chaise and the foot-way, the horse was killed.

Lord KENYON, in summing up to the jury, told them, that what was called the law of the road was introduced for general convenience: That where carriages were driving on a narrow road, or where accidents might happen, it ought to be adhered to; and in driving at night, the rule ought to be strictly adhered to, and never departed from, as it was the

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only mode by which accidents could be avoided: but he thought that where the road was sufficiently broad for all persons and carriages to pass, though a carriage might be driving on the wrong side of the road, if there was sufficient room for other carriages and horses to pass on the other, a person was not justified in crossing out of the way, in order to assert what he termed the right of the road. It was putting himself voluntarily into the way of danger, and the injury was of his own seeking. That seemed to be the case here: but the jury were to be of that opinion; if they thought otherwise, they would find for the plaintiff.

The jury found a verdict for the plaintiff.

Erskine and ——— for the Plaintiff.

Garrow for the Defendant.

A rule was afterwards obtained for a new trial. In *Easter* term it came on, when the Lord Chief Justice delivered himself in nearly the same terms; but added, that after the finding of the jury, as it was a question of public convenience, the verdict had better rest as it was.

New trial refused.

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Thursday, Dec. 6.

MAWLEY v. BARBET *et alt.*

The acts of one vestry are not absolutely binding on a succeeding vestry; and they may be confirmed or rescinded by such succeeding vestry; but the confir-

THIS was an action brought by the plaintiffs, claiming as churchwardens of the parish of *St. Pancras*, for interruption in a pew which they claimed a right to as churchwardens; and for the keys, &c. of the church.

The object of the action was, to try the title of the plaintiffs to the office of churchwardens of that parish, the defendants also claiming the office under an election held at a subsequent time.

The

The plaintiffs proved, that a vestry had been assembled on the 10th of *April*, in *Easter* week, which was the usual day for electing churchwardens; and that at that vestry the plaintiffs had been elected by a considerable majority.

This election had been made by the several persons coming to the communion-table; each person scratching on a paper, opposite to the person's name for whom he meant to vote.

mation of the succeeding vestry is not necessary to make the acts of a preceding one valid. The acts of a vestry may be valid, though the vicar was not present; he is not an integral part of the vestry.

The defendants relied, that this had been an irregular and tumultuous meeting, into which several persons had intruded who were not parishioners, and had voted in the choice of churchwardens; and that by an order of vestry made in the year 1792, it had been ordered, That the votes for churchwardens should be taken by poll, setting down the person's place of abode opposite to his name; so that it might appear that the person voting was a parishioner of the parish. This mode of election they stated to have been demanded, and not [688] complied with; and for this purpose, the entry in the parish-book of this resolution, entered into 1792, was offered in evidence.

A second ground of defence was, that, at a subsequent vestry, held on the 29th of *May*, the election of the plaintiffs, on the 10th of *April*, had been rescinded, and a new election ordered; under which the defendants had been elected.

These objections were made by the defendants' counsel.

Lord KENYON. Two objections have been made to the validity of the plaintiff's election. The first is, That, by an order of vestry made in the year 1792, it was ordered, that the election of churchwardens should be made by poll, and not by scratches: That, in the present case, it was demanded by the friends of the defendants, that the election should be held in that manner; and that not being so held, the election is void.

In order to make this a sufficient objection, it must appear that the vestry so made in the year 1792, was a good one; and binding upon those who came after. If there was any general law, which provided that the election should be according to the resolution of the vestry of 1792, it would be obligatory; so it might be on those who had so entered into the resolutions; but the act of one vestry cannot bind others who come after them, and have the same power with themselves. In the present instance, they have adopted a different mode; [689]
and

1799.

MAWLEY v. BARBER. et al.

and I am of opinion, that they were by law warranted in so doing.

The second objection is, That the nomination of the plaintiffs, as churchwardens, on the 10th of *April*, was rescinded, and a new election ordered; it being stated to be the usual way of proceeding at those vestries, to read over, at the next meeting, the resolutions of the preceding one; and to confirm or rescind them. I am of opinion, that they had no such power; and that there is no necessity for the confirmation of the second vestry, of what was legally done at the first. If the first was a legal vestry (and nothing appears here to impeach it) the election of the plaintiffs was legal. The plaintiffs became immediately legal officers; and, under the statute 43 of *Eliz.* invested with a temporal office of overseers of the poor, as well as a spiritual one.

It appeared in evidence, that the vicar had left the church before the election for churchwardens had commenced.

This was urged as an objection, on the part of the defendants.

Lord KENYON over-ruled it, saying, that he did not conceive the vicar to be an integral part of the vestry.

The plaintiffs had a verdict.

Erskine, Gibbs, and *Best* for the Plaintiffs.

Garrow, Leycester, Wood, and *'Espinasse* for the Defendants.

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SITTINGS AFTER TERM AT GUILDHALL.

Friday, *Dec.* 7th.

GOOD *v.* HILL, Executrix of GURNEY.

If there is a covenant in a lease, that a lessee shall pull down part of a building for the lessor to make a way across the ground where such building stood, the

THIS was an action of covenant for not pulling down part of a house, called *The Cherry Tree*, at *Southgate*, which had been let by the plaintiff to the defendant's testator.

Plea: That the testator had repaired and beautified other parts of the premises, at the plaintiff's request; which the plaintiff had accepted in satisfaction.

Replication: Protesting, that the plaintiff did not request the testator to repair; and replying, that he did not accept the repairs in satisfaction.

It

1799.

GOOD v. HILL, Executrix of GURNEY.

It appeared that the plaintiff had demised the house to the testator, who had covenanted to pull down the corner of it for the purpose of letting the plaintiff make a cart-way over the place where the corner of the house stood.

Lord KENYON, on looking into the lease, observed, That the plaintiff had not reserved a right to *use* a cart-way over the place where the corner of the house stood; and said, that he could not allow the plaintiff to go into evidence of any damage having been sustained, by reason of the corner of the house not having been pulled down.

plaintiff, in an action for breach of such covenant, can only recover nominal damages, unless he has reserved a right to *use* such way.

* The counsel for the plaintiff contended, That the reservation must be taken to be for the plaintiff's benefit; and that the defendant having covenanted to make the way, it should be inferred, that the plaintiff was to have the use of it; and that it was competent for him to shew that it would be of use to him.

[*691]

Lord KENYON. The plaintiff has demised the house called *The Cherry Tree*; and consequently the ground on which it stood. The way he claims is, to be made over part of the ground on which the house so demised stood. Every deed is to be taken most strongly against the grantor. If the corner of the house is pulled down, the plaintiff cannot use the ground on which it stood, because it passed by the demise; and not having reserved in the deed any right to use it, unless the plaintiff had so reserved it, he cannot claim it as a way, but by prescription: but as the testator did covenant to pull down the corner of the house, and has not done so, there must be a verdict for the plaintiff; but only for nominal damages.

The plaintiff had a verdict accordingly.

Gibbs and *Best* for the Plaintiff.

Erskine for the Defendant.

DE SAILLY v. MORGAN.

Same day.

THIS was an action of assumpsit, for the board and education of two boys, which the defendant had put to the plaintiff's school.

A letter written by a witness may be given in evidence, to contradict the testimony given by him at the trial.

Plea, *Non-assumpsit*.

*The defence was, that the education of the boys had been much neglected.

On

[*692]

1799. — De Sailly v. Morgan.

On the part of the plaintiff a witness was called, who was usher to the plaintiff's school, and had attended the two boys. He was asked, If there had been much attention paid to the morals, as well as the education of the boys? He answered in the affirmative.

Erskine, for the defendant, then proposed to read a letter, written by the witness to a boy who had formerly been at the plaintiff's school, but had then left it; which letter contained many passages very immoral, and inconsistent with the duty of a preceptor.

Garrow objected to this letter being given in evidence to affect the master.

Erskine contended, that it was admissible to impeach the credit of the witness; and that in a case of *Bond* v. *Oliver* (*Sittings at Westminster after this Term*) where a witness denied having any knowledge of a transaction which occurred between the parties in the cause, Lord Kenyon had suffered a letter to be read, which had been written by the witness, relative to that transaction, which he then denied, and contended, that the present case was a much stronger one, as the witness was the plaintiff's usher, and in his employ; and the fact, to which the letter related, was connected with the foundation of the plaintiff's action, namely, the education and attention paid to the morality of the boys at the plaintiff's school: a neglect of which was the foundation of his defence.

[693] Lord Kenyon thought the letter was admissible evidence; and it was accordingly read.

It afterwards appeared that the boys had been much neglected in respect to their writing, and other parts of their education.

Lord Kenyon, after animadverting very severely on the conduct of the plaintiff and of the witness, said, that the plaintiff had failed in the very foundation of his action.—A duty was cast upon the plaintiff, from his situation, to attend to the morals as well as the education of the boys committed to his care: from the observance of that duty, his right of action arose. In the present case, he had been guilty of a gross breach of it; the boys had suffered perhaps an irreparable injury, and he was entitled to nothing.

The plaintiff was nonsuited.

Garrow and *Walton* for the Plaintiff.

Erskine for the Defendant.

Wardell

1799.

WARDELL v. MOURILLYAN.

Same day.

How far the liability of hoymen extends after they have delivered the goods at the wharf to which they ply.

WARDELL v. MOURILLYAN.

THIS was an action on the case, for not delivering an anchor sent by the defendant's hoy, directed for Messrs. *Bell, Anchram*, and *Buxton, Rotherhithe*.

Plea, Not Guilty.

The first count of the declaration stated, That the defendant was to carry the anchor to *Dice's Quay*, and from thence to Messrs. *Bell, Buxton*, and *Anchram*. The second count was, That the defendant was to *carry and deliver it to Messrs. *Bell* and *Co.* without mentioning *Dice's Quay*. [*694]

It appeared in evidence, that the defendant was owner of a hoy, which sailed from *Deal* to *Dice's Quay*, near *London Bridge*; that the anchor had been shipped on board this hoy, with a direction to be delivered to Messrs. *Bell, Anchram*, and *Buxton*; that the defendant had delivered it at *Dice's Quay*; that the wharfinger had paid the hoyman the freight, and had given him a receipt for the anchor: and one witness proved, that, except in the case of flour, the hoymen never concerned themselves about goods after they had delivered them at the wharf.

Erskine, for the plaintiff, contended, that the defendant's having delivered the anchor at *Dice's Quay* did not discharge him: his liability did not end till he had delivered it according to the direction. He compared it to the case of a waggoner known to put up at a particular inn; in which case it had never been contended that the waggoner discharged his duty, merely by delivering goods intrusted him to carry, at the inn where he usually put up, unless he had particular instructions to that effect.

Lord KENYON said, It was a matter of great general importance, to ascertain what was the duty of a hoyman. The question in the present case was, Whether a hoyman, known to ply to some particular wharf, and constantly to use that wharf, discharged his duty merely by delivering goods sent by his hoy to that wharf? His Lordship observed, That a witness had proved that, except in the case of flour (which might be for some particular reason) the hoymen never troubled themselves about the goods, after they had delivered them at the wharf which they frequented; that the wharfinger paid the freight, and gave the hoyman a receipt for the goods delivered. [695]

He

1799.

WARDELL v. MOURILLYAN

He however left it to the jury to say, what was the custom; and they found a verdict for the plaintiff.

Erskine observed, that if the plaintiff could not recover against the hoyman, he was without remedy; as he could not maintain an action against the wharfinger, there being no privity of contract between them.

Lord KENYON said, the delivery of the goods at the wharf by the hoyman, raised an implied contract on the part of the wharfinger to take care of them, or to deliver them according to the direction; for the breach of which an action would lie.

Erskine and *Marryat* for the Plaintiff.

Mingay and *Gazelee* for the Defendant.

Saturday, Dec. 8.

SLOMAN, Executrix, *v.* HERNE, Knt. *et alt.* Sheriffs of *London*.

In an action against a sheriff for an escape, such evidence as would be sufficient to charge the original defendant with the debt is sufficient, as against the sheriff to support the averment in the declaration, that the party escaping was so indebted.—The attorney for the original defendant cannot be called as a witness to prove the debt, in an action against the sheriff for an escape, where he be-

THIS was an action against the defendants, as late sheriffs of *London*, for an escape of one *Alexander Innes*, who had been arrested at the suit of the plaintiff.

*The debt appeared to have arisen from the payment of a dividend on a bill of exchange made by the plaintiff's testator, on account of *Innes* and one Colonel *Turner*.

Garrow, for the defendant, objected: That as the debt appeared to have arisen from a payment on a bill of exchange, the bill itself should be produced and proved.

Park, for the plaintiff, contended, That an acknowledgment of the debt by *Innes* and *Turner*, and that the money had been paid by the plaintiff's testator on their account (which he meant to give in evidence) would be sufficient to charge them; and therefore insisted, that the same evidence was sufficient in an action against the sheriff for an escape.

Lord KENYON said, That whatever evidence would be sufficient to charge the original defendants, would do to charge a sheriff in such an action as the present; and therefore admitted it.

The plaintiff failing in proof of this acknowledgment by his own witnesses, proposed to call *Browne* the attorney for the defendants; who also had been attorney for *Innes* and *Turner*.

Garrow

Garrow asked Browne, on his being so called, If he knew any thing of the transaction, except what had been communicated to him by Innes and Turner?—He answered in the negative.

1799.

SLOMAN Executrix, v. HERNE, Knight, et alt. Sheriffs of London.

Garrow then contended, That he was not bound to answer any question relative to what had been so communicated to him.

Mingay, for the plaintiff, said, That as nothing had been communicated to him by the present defendants, the rule did not apply.

*Lord KENYON said, he thought it would be going too far to allow him to disclose information given to him by Innes and Turner. The parties were virtually the same; and he was of opinion, that the attorney ought not to be compelled to answer any questions communicated to him as attorney.

came acquainted with the business only by the information of his client.

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The plaintiff failing in proof of the debt from Innes and Turner, was nonsuited.

Mingay and Park for the Plaintiff.

Garrow and Gibbs for the Defendant.

BUCKLEY v. SMITH.

Monday, Dec. 10.

THIS was an action of assumpsit on a promissory note, drawn by the defendant, payable to one Mary Rossiter, or order, for 53l.

Where a witness to an instrument becomes incapacitated, proof of the party's handwriting is admissible.

Plea of the general issue.

The note was witnessed by one Mary Browne.

At the time of the trial, Mary Browne, the witness, was married to the plaintiff.

Lord KENYON admitted proof of the defendant's handwriting as sufficient evidence; the subscribing witness being incapacitated from being examined.

The plaintiff had a verdict.

Garrow and Lawes for the Plaintiff.

Erskine for the Defendant.

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SAUNDERS v. DAVISON et alt.

Same day.

THIS was a special action on the case on an agreement, whereby the defendants undertook to transfer the plaintiff's name on the opening of the 4 per cent. stock, 3,000l. stock, in lieu of the same sum sold by him to one Kentish.

Where a party possessed of stock, transfers it to another, who receives the

It

1799.

SAUNDERS v. DAVISON, *et alt.*

money under an agreement to replace stock to the same amount at a future day, though the party making it has no stock standing in his name at the time, it is a good agreement within stat. 7 *Geo.* II c. 8.

It appeared that the plaintiff, being possessed of 3,000*l*. 4 per cent. annuities, had executed a power of attorney to *Kentish*, to sell out the stock, and apply the money produced by it to his own use.

Kentish and the defendant, as his surety, entered into an agreement to transfer, at the opening of the stock, 3,000*l*. 4 per cent. annuities to the name of the plaintiff, in the place of the stock sold out by *Kentish;* and it was for breach of this agreement that the present action was brought.

The defendants relied, that as they had no stock standing in their names at the time the agreement was made, that it was therefore void, under Sir *John Barnard's* Act, 7 *Geo.* II. *c.* 8.

[*699]

*Lord KENYON said, he was of opinion that the object of the statute was only to prevent gambling in the stocks; that this could not in any point of view be considered as such; and was therefore not within the statute. Vide *Sanders* v. *Kentish* and *Hawkesley*, 8 Term Rep. 162.

Erskine and *Bailey* for the Plaintiff.

Gibbs and *Wood* for the Defendant.

Same day.

COARE *v.* CREED.

A sale by the mortgagee of a bankrupt's estate, is liable to the auction duty.

ASSUMPSIT for money had and received.

The action was brought against the defendant, who was an auctioneer, to recover the sum of 65 *l.* the amount of the deposit on the sale of an estate.

It appeared in evidence, that one *Palin*, who had mortgaged the estate in question to the plaintiff, had become a bankrupt. On a party becoming a bankrupt, by an order made by the *Lord Chancellor*, it is directed that all the estates of the bankrupt in mortgage are to be sold before the commissioners. The sale in question had been made before the commissioners acting under the commission against *Palin*, by the defendant as the auctioneer. The sum of 65 *l.* had been paid as a deposit; and the action was brought to recover the whole of this sum.

The defendant had paid 45 *l.* 10*s.* into court, and claimed a right to deduct the remainder for the auction-duty, and one guinea for his trouble.

By a clause in stat. 19 *Geo.* III. *c.* 56, imposing a duty on auctions,

auctions, there is an exception of sales of bankrupts' effects before commissioners; and the plaintiff contended that the sale, in the present case, was a sale of a bankrupt's effects within the meaning of the act of parliament, and so not subject to the duty.

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The defendant relied, that as an auctioneer, he was bound to pay the auction-duty over to the collector; that this was a sale by a mortgagee, and so no part of the bankrupt's estate; that it was therefore liable to the auction duty; and that, in point of fact, he had paid it over to the collector, in consequence of his deeming himself liable.

Lord KENYON said, he was of opinion that the estate was liable to the auction-duty; and his Lordship therefore directed the jury to find a verdict for the defendant; which they accordingly did.

Garrow and *Lambe* for the Plaintiff.

Erskine and *'Espinasse* for the Defendant.

WRIGHT *v.* BARNARD.

Tuesday, Dec. 11th.

A notarial copy of the condemnation of a ship as not being worth repairing, is only evidence of the fact of her having been condemned, not of the particular defects on which the condemnation was grounded.

THIS was an action on a policy of insurance on the ship *Silvina*, from *Norfolk* in *Virginia* to the port of *London*. The loss stated in the declaration was by the perils of the sea.

*The defence relied on was, that the ship was not sea-worthy at the time she sailed.

It was proved on the part of the plaintiff by the person who had effected the insurance, that he had laid the letter of orders, which he had received from the plaintiff, before the defendant and the other underwriters. In that letter it was stated, that the ship had been a condemned ship, but that previous to her voyage she had undergone a complete repair, and that the captain was satisfied with it before she sailed.

[*701]

The defendant had filed a bill of discovery, and for an injunction in the Court of Exchequer; and by rule made by that court, it was ordered that a notarial copy of the condemnation of the ship should be admitted in evidence.

The condemnation had been made by several ship-carpenters in *America:* it stated the particular defects of the ship, her timbers, &c. specifying them at large; and it then concluded, that the ship was condemned, as not being worth repairing.

The

1799.

WRIGHT v. BARNARD.

The captain of the ship was called by the plaintiff, and proved that the ship had undergone a complete repair under his direction; and he mentioned the particulars of the repairs which had been done; with which he declared himself to have been perfectly satisfied, and that the ship was sea-worthy.

Gibbs, for the defendant, produced the notarial copy of the condemnation, and proposed to give it in evidence, in order to shew by it *in what particulars the ship had been defective and out of repair;* so that what had been done, according to the relation of the captain, was insufficient, and that the ship was not thereby rendered sea-worthy.

This was objected to on the part of the plaintiff.

Lord KENYON. I am of an opinion, that the condemnation is inadmissible to the extent contended for. Sitting in a court of law, I can receive no evidence but what comes under the sanction of an oath. The evidence now offered is the report of certain ship-carpenters, made *ex parte;* and without the obligation of an oath I cannot receive it. I will admit the condemnation as evidence of the fact, that a condemnation had
[702] taken place, but no farther.

The plaintiff had a verdict.

Erskine, *Park*, and *'Espinasse* for the Plaintiff.

Gibbs and *Giles* for the Defendant.

Thursday, Dec. 12.

ROGERS, Assignee of STOKES, v. EDMUND BOEHM, HENRY NANTES, and JOHN TAYLOR.

If partners are sued jointly, and one of them is misnamed, it must be pleaded in abatement, and cannot be taken advantage of afterwards.—Where money is remitted to an agent, if he applies that money to

ASSUMPSIT for money had and received.

Plea of *non-assumpsit.*

Stokes, the bankrupt, had formerly been captain of the *Nottingham East *Indiaman;* he had become a bankrupt about the year 1792; a considerable part of his property was in *India;* and a Mr. *Johnson*, who was then his assignee, had sent out a power of attorney to Messrs. *Pulling* and *De Fries*, of *Madras*, to recover his property there, and to remit it to *England.*

Pulling and *De Fries* recovered property to the amount of 7290*l.* and in the beginning of the year 1793, remitted the property so recovered, in a bill at twelve months, to the house
[*703] of the defendants; which was received in the month of *October*, 1794.

1794. This money had remained in the hands of the defendants from that period to the time of bringing the present action, the object of which was to recover as well the money so remitted as *interest* for it, from the time it was so received.

It appeared in evidence, that *Taylor*, one of the defendants, had been examined before the Commissioners under the commission against *Stokes*, the bankrupt; and on such examination had admitted the receipt of the money, and that the defendants had paid into their banker's hands generally on their own account, and had used it in the course of their trade.

his own use, he is liable to pay the interest from the time he has so applied it. *Aliter*, where he has so suffered it to lie dead in his hands.

Garrow, for the defendants, took a preliminary objection as a ground of non-suit. He stated that the house of trade who had received the money, and who would be liable if the present action was sustainable, consisted of *Edmund Boehm*, *Daniel Nantes*, and *John Taylor*. The object of the present action was to support a contract with *Edmund Boehm*, *Henry Nantes*, and *John Taylor*, against whom the writ had been sued out. There was no impossibility that there might have been some contract between the plaintiff and the former parties. The defendants on the present record denied any contract made with them jointly with a person of the name of *Henry Nantes*; and he therefore contended that there must be a non-suit. He admitted that it was clear law, that if there was but one defendant, and he was sued by a wrong christian name, that he must plead it in abatement; but contended that the rule did not hold where there was a misnomer of one sued jointly with others.

Lord KENYON said, that there was no difference in the present case and where a person is solely sued. *Daniel Nantes* had been sued as partner with *Edmund Boehm* and *John Taylor*, by the name of *Henry Nantes*. He should certainly have pleaded it in abatement; and could not at that stage of the cause avail himself of such an objection. [704]

On the merits of the case, his Lordship said, he had no doubt the plaintiff was entitled to recover. He observed that there were cases in which the rules of equity and law were the same, and that this was one of that description. It had been decided in a court of equity, that if money had been remitted to an agent, and he suffered it to remain dead in his hands, he should not be liable to interest: but that if he mixed it with his own, or made any use of it, he should be subject to the charge of interest. In the present case, it was in evidence that the

1799.

Rogers, Assignee of Stokes v. Edmund Boehm, Henry Nantes, and John Taylor.

defendants had paid the money remitted to them as agents into their own banker's, and had used it as their own; and his Lordship added, he was of opinion that they thereby made themselves liable for the interest: and the jury found a verdict accordingly.

Erskine, Gibbs, Wood, and *Dickins* for the Plaintiff.

Garrow and *Park* for the Defendants.

Vide *Travers* v. *Townsend*, 1 *Bro.* Cas. Chan. 384. *Franklin* v. *Frith*, 3 *Bro.* 413.

[705]

Saturday, Dec. 15.

Sikes and Others *v.* Marshal.

Where entries have been made by a clerk who is since dead, proof of his hand-writing will not make such entries evidence.—The indorser of a promissory note who has become a bankrupt, may be a witness in an action by the indorsee against the maker, to disprove the plaintiff's title.

THIS was an action of *assumpsit* on three promissory notes. Plea of the general issue.

The plaintiffs declared as indorsees of Messrs. *Wilkinson* and *Chapman* against the defendant, as the maker of the notes; and the case on their part was, that Messrs. *Wilkinson* and *Chapman* being much indebted to the plaintiffs, applied to them at different times about the month of *April*, 1793, to discount the notes in question. The plaintiffs at first refused, as they were then considerably in advance to Messrs. *Wilkinson* and *Chapman;* but being much pressed by them to comply, at last consented, and discounted one of the notes for 700*l.* in the usual manner, and carried the others to the credit of *Wilkinson* and *Chapman,* without applying any part of the money in liquidation of their demands against them: and *Wilkinson* and *Chapman* afterwards drew upon them for the amount of these notes.

The defence set up on the part of the defendant was, that he being a coal-merchant, at *South Shields,* had been in the habits of drawing upon *Wilkinson* and *Chapman*, as his correspondents in *London*. That about the period in which the three notes in question were given, *Wilkinson* and *Chapman* were under acceptances for him of three bills of exchange, to exactly the same amount as the notes in question; and that

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these notes were given as counter-securities for such acceptances: that this fact was known to the plaintiffs at the time they discounted the notes for *Wilkinson* and *Chapman;* and that therefore, as they had given cash to *Wilkinson* and *Chap-*

man

man for those notes, knowing that they had not been applied to the purpose for which they were destined by the maker, they were not entitled to recover against him.

A Mr. *Watson* (who at the period this transaction took place, was a clerk in the plaintiff's banking-house) was called to prove the discounting of the notes in question. He was asked by *Garrow*, of counsel for the defendant, if he did not know that at the time the plaintiffs discounted those notes for *Wilkinson* and *Chapman*, three bills drawn by the defendant on *Wilkinson* and *Chapman*, and accepted by them to exactly the same amount as the notes, were nearly due?

Erskine, for the plaintiffs, objected to the question. He said the bills themselves should be produced, as affording the best evidence of the fact.

Lord KENYON. The bills must be produced at some stage of the cause; but at present I think the question a proper one. In cases of bankruptcy, you ask if the bankrupt was not distressed at a particular period, by bills becoming due, he not having made any provision for them, and yet the bills are not called for.

Holroyd, for the plaintiffs, proposed to read entries made in the plaintiffs' books of payments, on account of the notes in question; and as the clerk who made those entries was dead, he offered to give evidence of his hand-writing.

Lord KENYON. It can't be done. Since the statute of *James*, books are not evidence after the year; this is going much further: such evidence has never been admitted; and I can't receive it. [707]

On the part of the defendants, depositions were offered in evidence, which had been made at *Elsinore* by *Chapman*, one of the partners with the house of *Wilkinson* and *Chapman*, who was an uncertificated bankrupt, and had been obliged to fly from *England*.

Erskine objected to such depositions being read till they shewed that *Chapman* had been released. The grounds of his objection were, that *Chapman* was interested in the event of this cause: the plaintiffs derived their title from him and his partner: though he was then uncertificated, he might not long continue so. If his evidence went to defeat the claim of the plaintiffs, they must come in under his commission, because the money had been paid before the bankruptcy: whereas, if the defendant failed, he would have a demand against

1799.

Sikes and others v. Marshal.

Wilkinson and *Chapman*, to which their certificate would be no bar; because, though he might have had a claim against them before the bankruptcy, the money would not be actually paid till after: he therefore submitted, that *Chapman* was clearly interested, and should be released.

Lord Kenyon. I think *Chapman* is indifferent; he is now uncertificated; I can't look to contingencies: if the plaintiffs have a verdict, the defendant may, if he pleases, come in under the commission against *Chapman* and *Wilkinson*. The [708] Chancellor, on the petition, will admit him to prove under the commission at any time before a final dividend is made; not, however, so as to disturb former dividends. I am positively clear, *Chapman* is not interested; besides a release given now would not restore his competence, if he was interested at the time he made the depositions.

The jury (which was a special one) found a verdict for the plaintiffs for the amount of the three notes.

Erskine, *Law*, and *Holroyd* for the Plaintiffs.

Garrow, *Gibbs*, and *Bayley* for the Defendant.

Tuesday, Dec. 18th.

Harrison v. Wilson.

If the declaration states an agreement to take in a full cargo, and that proved to be to take in a certain quantity, specifying it, though such quantity may be a full cargo, the variance is fatal.—On a count for demurrage generally, the plaintiff cannot recover when the demurrage or detention has arisen *ex delicto*.

UNDER stat. 13 and 14 *Car.* II. ch. ii. § 7. a sufferance must be taken out on goods sent coastways. The ship *Liberty* had taken in a cargo of wheat from *London* for *Weymouth*, but had omitted to take out a sufferance. A custom-house officer having searched at the custom-house, and having found no sufferance registered for the wheat so shipped by the defendants, seized it; and the present action was brought by the owners of the vessel to recover damages for the detention of the ship, in consequence of the seizure of the cargo.

The agreement, stated in the first count of the declaration, was to take in a full cargo; the agreement proved, was to take on board from five to six hundred quarters of wheat.

[*709] *This was objected to as a variance; but in answer to it the plaintiff offered to prove, that from five to six hundred quarters was a full cargo.

Lord Kenyon held it to be a fatal variance; and the first count was abandoned.

It was then contended that the plaintiff might have recourse to

to two other counts in the declaration; the one for the hire and use of the ship; the other for demurrage. Either of which the evidence would support.

Upon these points Lord Kenyon said, that to meet the first, the proof must be of an agreement for the unqualified use of the ship: and to support the second, a demurrage upon a contract should be proved, and not one arising *ex delicto*.

The plaintiff failed in his case on both these grounds.

There was another count in the declaration, stating, that in consideration that the plaintiff would permit the defendant to detain his ship, defendant would pay any damage occasioned by such detention; and the evidence proving that the defendant had told plaintiff he expected his wheat would be liberated, and that, if so, he would then dismiss him, and the detention should be settled,—it was urged that this was but a conditional undertaking: but Lord Kenyon ruled, that the evidence supported the count; and the plaintiff had a verdict.

Erskine, *Gibbs*, and *Alderson* for the Plaintiff.

Garrow and *Park* for the Defendant.

CASES

ARGUED AND RULED

AT

NISI PRIUS,

IN THE

COMMON PLEAS.

MICHAELMAS TERM, 39 GEO. III.

SITTINGS AFTER TERM, AT GUILDHALL.

1799.

Friday,
Dec. 7th.

Where an agent is employed to sell goods, and he sells them on credit, he cannot be called upon to pay the money over to the principal until he has received the whole from the persons to whom he sold the goods, unless the delay in the payment has been occasioned by his neglect.

VARDEN, Executor of JOHNSON, *v.* PARKER.

THE declaration in this case stated, "That in consideration "that the testator, in his life-time, had delivered certain "goods to the defendant, to be by him disposed of for a reasonable reward, on account of the testator, he promised to "sell the same, and to pay over the produce:" it then averred, That he did sell; but had not accounted, or paid over the produce to the plaintiff: there were also the common money counts.

Plea of the general issue.

The plaintiff proved the delivery of the goods by the testator to the defendant, and the agreement, as stated in the declaration.

[*711]

*On the part of the defendant it was proved, That the goods had been sold by him; but that they were sold upon credit: and that he had informed the testator of the circumstance, and of the person to whom he had sold. It was further proved,

That

That, at the time the action was brought, he had not received the money for the goods he had so sold.

BULLER, Justice, was of opinion, that the action was prematurely brought: he said the point was new; but that it was his opinion, that if an agent was employed to sell a quantity of goods, and he received part only of the price, the principal could not maintain an action against him till the transaction was closed; unless it appeared to be the fault of the agent that the rest of the price was not recovered. If a contrary practice was to prevail, there might be many actions brought where one cause of action only existed.

The plaintiff was nonsuited.

Cockell, Serjeant, and *Lawes* for the Plaintiff.

Shepherd, Serjeant, for the Defendant.

WATKINS v. ROBB.

ASSUMPSIT for sailors' wages.

Plea, *non-assumpsit* as to all but 4*l.* 9*s.* 6*d.*; and as to that a tender.

In support of the tender, the defendant proved, that the agent for the plaintiff demanded of the agent for the defendant, 27*l.*; the defendant's agent tendered a 5*l.* note, and demanded sixpence change. [712]

BULLER, Justice, was of opinion, that proof of a tender of 4*l.* 19*s.* 6*d.* did not support the plea of a tender of 4*l.* 9*s.* 6*d.* as it did not meet the plea in point of fact, nor was the plaintiff bound to give change; but he saved the point.

Cockell, Serjeant, and *Barrow* for the Plaintiff.

Shepherd, Serjeant, and *Lawes* for the Defendant.

BELL v. POTTS.

Tuesday, Dec. 11th.

Goods purchased in an enemy's country, if the property of a subject of this country residing here, and sent to

CASE on a policy of insurance on goods on board the *Elizabeth*, from *Rotterdam* to *Hull*. Loss by capture.

It appeared that the goods insured had been bought in *Holland*, by an agent of the plaintiff; and by him shipped for *England*: and the defence was, that the goods, being purchased in an enemy's country, were not insurable property.

BULLER,

1799.

Bell v. Potts.

England, are insurable property.

Buller, Justice. The defendant resists this action, because an agent for the plaintiff, purchased these goods in *Holland*, an enemy's country, though the party for whom they were purchased, and for whom the insurance was effected, is an *Englishman*, and living in *England* at the time the insurance was made. If this had been the first time this case had come before the court, I should not have admitted any evidence as to where the goods were bought; I should say, it was sufficient that the plaintiff is an *Englishman*, and wished to bring

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his goods to *England*. This case was argued last term; and it was relied, for the defendant, that there had been a similar case before the commissioners of appeal. That case was of three partners, two of whom lived at *Malaga*, and one in *England*: Wines (the produce of *Spain*, an enemy's country) were sent to *England*, the ship was captured, and afterwards condemned: this was heard before the Commissioners of Prizes;—two parts were condemned, and the third not. That determination went on the ground; that two of the partners resided in an enemy's country; but it don't affect the present question, when the party insuring lives in *England*. I am clearly of opinion that the plaintiff is entitled to recover.

In this case there having been considerable delay upon the part of the defendant, without any meritorious ground of defence, Buller, Justice, told the jury they might give interest for the money from the time it should have been paid after the loss; and said that Lord Mansfield had often ruled so.

The counsel for the defendant wished to have a special verdict. Buller, Justice said, that where his opinion was clear, he would never recommend the jury to find a special verdict:—it was in their discretion to do so or not.

The jury found a verdict for the plaintiff with six month's interest.

Le Blanc, Serjeant, and *Wigley* for the Plaintiff.

Shepherd, Serjeant, and *Williams*, Serjeant, for the Defendant.

CASES

ARGUED AND RULED

AT

NISI PRIUS,

IN THE

KING'S BENCH;

HILARY TERM, 39 GEO. III.

FIRST SITTING DAY IN TERM.

1799.

BATCHELOR *v.* SIR JOHN HONEYWOOD.

Jan. 26.

The evidence of a clerk in the Post-Office, employed in detecting the forgery of the franks, but who has no acquaintance with the hand-writing of a member of parliament, except from seeing his franks pass through the office, is not sufficient proof of such member's hand-writing.

THIS was an action of assumpsit, brought by the plaintiff as the indorsee of a bill of exchange, drawn by Lord *George Thynn* in his own favour, on the defendant, for 600*l.* and indorsed by him to the plaintiff.

To prove the hand-writing of Lord *George Thynn*, the plaintiff called the inspector of franks at the Post-Office. He stated the nature of his office to be, to inspect the hands'-writing of the several members of parliament to the franks put into the Post-office bearing their names, for the purpose of detecting any forgeries which might be practised.

*He stated, that Lord *George Thynn* was a member of parliament: that he was perfectly acquainted with the character in which his franks were written, having passed several of them; and that, from the similitude of characters, he believed the hand-writing of the indorsement on the bill to be that of Lord *George Thynn*.

He [*715]

1799.

Batchelor v. Sir John Honeywood.

He was asked, on his cross-examination, If the franks of Lord *George Thynn* had ever been questioned, so as to have made it necessary for him to have applied to Lord *George* on the subject, so that he had acknowledged his hand-writing to the witness in any one instance? or whether he had any other knowledge of Lord *George Thynn*'s hand-writing, except in the manner he had stated?—He answered both questions in the negative.

Erskine then objected to this evidence, as not sufficient of the indorser's hand-writing.

Lord Kenyon. This evidence is certainly not sufficient, or such as can be admitted. If persons are in the habit of corresponding, and letters are received from one to the other, upon which any transaction takes place, that may enable the party to swear to his correspondent's hand-writing; but no such transaction took place here. The witness never saw Lord George Thynn write, nor ever heard him acknowledge his hand-writing, and the only mode by which the witness pretends to a knowledge of the hand-writing is, by comparison of hands;—it is too loose, and cannot be received.

Garrow and *Marryat* for the Plaintiff.

Erskine for the Defendant.

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Jan. 26.

Kelly and Wife v. Small.

Where an action is brought by the husband and wife for a debt due to the wife, *dum sola*, any admission respecting it, made by the wife after marriage, is inadmissible as against the husband.

ASSUMPSIT for money lent, with the common money counts.

Plea of *non-assumpsit*.

The action was brought to recover a sum of money lent by the plaintiff *Ann*, while she was sole to the defendant; and for money paid for his use at the same period.

The defence attempted was, That the plaintiff's wife before her intermarriage, lived as a mistress with the defendant; during which time they had had a common purse, so that whatever money transactions might have taken place between them, it was not in the nature of a loan: and the defendant proposed to call a witness to prove, that since her marriage, the wife had said she had no demand against the defendant; but was compelled to sue him by her husband.

This evidence was objected to by the plaintiff's counsel.

Mingay, for the defendant, contended, That it was admissible, on the ground that, as the debt had been contracted and owing

owing to the wife before marriage, it was in fact her debt; and any admission respecting it, made by her, was evidence.

1799.

KELLY and WIFE v. SMALL.

Lord KENYON said, the evidence was inadmissible: it was receiving admissions of the wife to the prejudice of the husband. This was a general principle; and the particular circumstances of the debt due to the wife before marriage, makes no difference. By the intermarriage, the property becomes the husband's; and no confession of hers can be received.

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The plaintiff had a verdict.

Garrow and *'Espinasse* for the Plaintiff.

Mingay for the Defendant.

SITTINGS AFTER TERM AT WESTMINSTER.

DOE ex dem. HOLLINGSWORTH v. STENNETT.

Feb. 15.

If a tenant, whose lease, is expired, is permitted to continue in possession, pending a treaty for a further lease, he is not a tenant from year to year; but so strictly at will, that he may be turned out of possession without notice. *Aliter*, if he has continued in possession a year, or rent has been received.

THIS was an action of ejectment.

The defendant held the premises as tenant to the plaintiff, under a lease which expired on the 24th of *June*, 1798.

The demise laid in the declaration in ejectment, was on the 1st of *July*, in the same year.

A notice to quit was proved, dated the 17th of *August* following. The ejectment was of *Michaelmas* term.

For the defendant, it was relied, as a defence to the action, That, at the expiration of the lease, the parties had entered into a new agreement for a further term of seven years. This was however by parol, and void under the statute of frauds; but it was contended, that the defendant, having been permitted to continue as tenant after the expiration of his lease, he should be taken to continue as tenant from year to year; and so the ejectment was not maintainable, it being brought before the year expired.

Lord KENYON asked, If the defendant had been allowed to continue tenant for a year? or if the lessor of the plaintiff had received any rent from him? Being answered in the negative, he said, he should not hold this to be a tenancy, unless strictly at will: that the statute of frauds was decisive; it being thereby declared, that all agreements for a longer term than three years should be void, where there was no note in writing; and it had been held, that such parol agreement was not good even for three years. The agreement being therefore void, the

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1799.

Doe ex dem. Hollingsworth v. Stennett.

the defendant was in by no title of tenancy whatever; but held at the will of the lessor, in the strictest sense of the word.

The defendant's counsel then relied, That the plaintiff could not recover in this ejectment, on the ground that the defendant was in possession by the lessor of the plaintiff's permission, after the time of the demise to the plaintiff, so that at that time he could not be a trespasser; and cited *Goodtitle* ex dem. *Galloway* v. *Herbert*, 4 *Term Rep*. 680.

To prove this, they gave in evidence, that such an agreement as is before stated, had been entered into between the defendant and the lessor of the plaintiff: that leases had been actually prepared in pursuance of it; and the 31st of *July* fixed for the execution of them: and that the defendant had been always ready to have done his part, and accepted the lease.

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Lord Kenyon ruled, that the defendant must be deemed to be in by the lessor of the plaintiff's permission till the treaty for the lease was at an end, which, at soonest, was not till the 31st of *July*; so that on the 1st of *July*, the day laid in the declation, he was not a trespasser; and directed a nonsuit.

Garrow and *Reader* for the Plaintiff.

Gibbs and *Wigley* for the Defendant.

Vid. *Doe ex dem. Martin* v. *Watts*. 7 *Term Rep*. 83.

Feb. 18*th*.

Rex v. Hammond and Webb.

In an indictment for a conspiracy, the prosecutors may go into general evidence of its nature, before it is brought home to the defendants.

THIS was an indictment against the defendants, who were journeymen shoe-makers, for a conspiracy to raise their wages.

It was stated, on the part of the prosecution, That a plan for a combination amongst the journeymen shoe-makers had been formed and printed in the year 1792, regulating their meetings,—the subscriptions for their mutual support,—and other matters for their mutual government in forwarding their designs.

The prosecutor's counsel were going into evidence of this, when the defendants' counsel objected to its being admitted, until it was brought home to the defendants, and they were made parties to the combination stated.

Lord Kenyon. If a general conspiracy exists, you may go into

into general evidence of its nature, and the conduct of its members, so as to implicate men who stand charged with acting upon the terms of it, years after those terms have been established, and who may reside at a great distance from the place where the general plan is carried on: such as was done in the cases of the state trials in the year 1745; where, from the nature of the charge, it was necessary to go into evidence of what was going on at *Manchester*, in *France*, *Scotland*, and *Ireland*, at the same time.

His Lordship therefore permitted a person who was a member of this society, to prove the printed regulations and rules of the society, and that he and others acted under them in execution of the conspiracy charged upon the defendants *Hammond and Webb*, as evidence introductory to the proof that they were members of this society, and equally concerned —but added, that it would not be evidence to affect the defendants, until they were made parties to the same conspiracy.

In the course of the evidence, it was stated, that the demands of the journeymen had been occasioned by some of the masters giving wages beyond what were the usual ones in the trade.

Lord Kenyon said, that masters should be cautious of conducting themselves in that way, as they were as liable to an indictment for a conspiracy as the journeymen—and there was a case where a master, from shewing too great indulgence to his men, had become himself the object of a prosecution.

The defendants were found guilty.

Mingay, *Gibbs*, and *Marryat*, for the Prosecution.

Erskine, *Garrow*, and *Barrow* for the Defendants.

Rodriguez *v.* Tadmire.

In an action for malicious prosecution, where the defendant gives evidence of probable cause, a witness may be asked whether the plaintiff was not a man of notoriously bad character.

THIS was an action of malicious prosecution.—The declaration stated, That the defendant, maliciously intending to injure the plaintiff, had charged him with having stolen three shirts and a gown, the property of the defendant; and had caused him to be brought before a justice of peace, when he was discharged, &c.

The defendant grounded his defence on a probable cause, and proposed to give in evidence, in addition to the circumstances

1799.

RODRIGUEZ v. TADMIRE.

stances of suspicion, which were sufficient to justify his taking the defendant into custody, that he was a man of notoriously bad character—and a question was put to that effect by the defendant's counsel.

It was objected by the plaintiff's counsel, on the ground that character was not in issue in the cause, so that he could not come prepared with evidence to meet it.

Lord KENYON ruled, That the question might be put in a general way, "Whether the plaintiff was not a man of bad "character?" but particular instances could not be asked by the defendant's counsel, though they might by the plaintiff's.

The defendant had a verdict.

Mingay and *Morgan* for the Plaintiff.

Garrow and *'Espinasse* for the Defendant.

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BELLIS v. BURGHALL.

A room kept by a dancing-master for the instruction of his scholars and subscribers, and to which persons are not indiscriminately admitted, is not within the statute 25 *Geo.* II. c. 36.

THIS was an action of debt, on the statute 25 *Geo.* II. ch. 36, to recover the penalty of 100*l.* given by that statute, for keeping a house for public dancing and music, without having a licence, pursuant to that statute.

The case, as it appeared in evidence, was this:—The defendant was a dancing-master; he was the proprietor of a large room, not part of his dwelling-house, where a considerable number of persons met every *Wednesday* night, for the purpose of dancing; but it appeared that the defendant issued tickets to subscribers only for a given number of nights; the gentlemen having tickets, were permitted to introduce a lady —no money was taken at the door, nor were persons admitted indiscriminately, nor in fact any person but subscribers, persons introduced by subscribers, or persons who came there by permission of the defendant, as his friends.

The counsel for the defendant contended, that the act of parliament was not levelled against meetings of the description given in evidence, but was intended to prevent disorderly meetings, where persons were admitted for hire, not where the company was select, and where they met only for the purpose of improvement.

Lord KENYON ruled, That it was not a meeting within the prohibition of the statute, and nonsuited the plaintiff.

Garrow, *Lawes*, and *Bailey* for the Plaintiff.

Erskine for the Defendant.

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CARTWRIGHT v. ROWLEY. Tuesday, Feb. 19th.

CARTWRIGHT v. ROWLEY.

Money paid voluntarily, cannot be recovered back in *assumpsit*.

ASSUMPSIT for money had and received.

The plaintiff was the patentee of a steam-engine, and had employed the defendant, who was an engine-maker, to make some engines for him, under the patent. In the progress of the work, the plaintiff had advanced several sums of money to the defendant, which he sought now to recover back, on the ground that the defendant had been so inattentive to the order, and so long in completing the engines, that the opportunity of disposing of them was lost; so that they became useless to the plaintiff. The ground relied upon to establish the plaintiff's right to recover in this action was, that the money was paid without any consideration; the work, for which it had been given, having been rendered, by the defendant's own default, of no value to the plaintiff.

Lord KENYON, C. J.—This action cannot be maintained, nor the money recovered back again by it: it has been paid by the plaintiff voluntarily; and where money has been so paid, it must be taken to be properly and legally paid; nor can money be recovered back again by this form of action, unless there are some circumstances to shew that the plaintiff paid it through mistake, or in consequence of coercion. I recollect a case of —— v. *Pigott*, where this action was brought to recover back money paid to the steward of a manor, for producing at a trial some deeds and court-rolls, and for which he had charged extravagantly. The objection was taken, that the money had been voluntarily paid, and so could not be re- [724] covered back again; but it appearing that the party could not do without the deeds, so that the money was paid through necessity and the urgency of the case, it was held to be recoverable.

The plaintiff was nonsuited.

Erskine, Gibbs, and *F. Vaughan* for the Plaintiff.

Garrow, Dampier, and *Best* for the Defendants.

DOE ex dem. ST. JOHN v. HORE.

Tuesday Feb. 19th.

A written agreement, though coming out of the possession of the opposite

EJECTMENT for a wharf.

By lease, the 6th *July*, 1795, *St. John*, the lessor of the plaintiff, leased the premises in question to the defendant *Hore*.

In

1799.

DOE ex dem. ST. JOHN v. HORE.

party, cannot be given in evidence, unless it is legally stamped.

In the lease was the covenant, "that the lessor should not "alien, assign, or part with the estate, interest, or term in the "said premises, or any part thereof," &c. and for breach of covenant, a right of re-entry.

The ejectment was brought for the forfeiture, on the ground that the defendant had underlet.

The plaintiff's counsel stated, That in *August*, 1796, one *Cobham* had taken and occupied the premises. He had given notice to his landlord the defendant to quit, and had done so on the 12th of *August*, 1797; and after that time, two other persons, of the names of *Giles* and *Farringdon* had taken the premises for a year, with liberty to quit at a quarter's notice.

[725] To prove the taking and occupation by *Cobham*, he was called as a witness.

He was asked by the defendant's counsel, if the agreement between him and *Hore* had not been in writing?—He answered, that it was.

Notice had been given to the defendant to produce it, and it was now produced, but it was unstamped; and the defendant's counsel relied, that it could not be therefore given in evidence.

The plaintiff's counsel, on the other hand, contended, that the defendant should not be permitted to avail himself of his own default, in not having the instrument legally stamped, nor should that avail against the plaintiff, who was no party to it. That by the rule in the *King* v. *Middlezey*, 2 *Temp. Rep.* 41, an instrument was produced by the opposite party, that made it admissible evidence without further proof.

Lord KENYON, C. J. The instrument is produced in evidence of an agreement which the law requires to be stamped; and I am bound by that law not to admit it without it. The *King* v. *Middlezey* decided, that where an instrument was produced by the opposite party, it dispensed with the necessity of calling the subscribing witness, which, from the circumstance of the instrument being in the hands of their adversary, the party could not know who he was; but that case went no farther.

The plaintiff's counsel were proceeding to ask *Cobham* as to his occupation, and the payment of rent by him to the defendant; but were stopped by Lord KENYON, who added, This

[726] has been an occupation under an agreement in writing, and the rent paid in pursuance of it: If the agreement cannot be given

1799.

Doe ex dem. St. John v. Hore.

given in evidence, you cannot enquire as to the occupation; the party might have been in possession by licence and permission of the defendant, and not as tenant.

The plaintiff was nonsuited.

Erskine, *Gibbs*, and *Yeates* for the Plaintiff.

Garrow and *Wigley* for the Defendant.

Brown, v. Jacobs, Gent.

Wednesday, Feb. 20.

When the declaration in an action for negligence sets out on a writ, it is not sufficient that the name of the party and the name in the writ have the same sound; any mis-spelling of the name is fatal.—An averment that the defendant was discharged by the Court of Exchequer, being supersedeable for not being charged in execution, is not bad, because the supersedeas was by an order of a single Baron.—If an addition to the name is in the writ, it is not fatal if it is omitted in the declaration. *Aliter*, if it is found in the declaration, not being in the writ.

THIS was an action on the case, against the defendant, who was an attorney, for negligence. The negligence charged in the declaration was, in not charging one *Margaret Brown* in execution, at the suit of the plaintiff, in a cause in which the present defendant had been his attorney. Notice of surrender of *Margaret Brown*, in discharge of her bail, was proved to have been given on the 16th of *April*, 1797; and she had never been charged in execution.

To prove the commencement of the suit according to the averment in the declaration, at the suit of the plaintiff against *Margaret Brown*, he produced the writ, which was a *quo minus*, out of the Exchequer.

The declaration stated, "That the said *Margaret* was arrested, by virtue of a writ of *quo minus* issued against the said *Margaret*, by the name of *Margaret Brown*, otherwise *Southall*."

The name in the writ when produced was *Suthall;* which was objected to as a variance.

*It was answered by Mr. *Gibbs*, that the sound being the same, it was not a material variance.

Lord Kenyon, C. J. In the case of pleas of abatement, it is sufficient that the sound is the same; but here it is a matter of written evidence; a writ stated and set out, and not corresponding with that produced in evidence; I think it is bad, but will not stop the cause on that objection.

The declaration then averred, "That the said *Margaret*, by the court before the Barons of the Court of Exchequer, was discharged."

It appeared that the supersedeas was by virtue of an order made by a single Baron at *chambers*.

It was objected, that the defendant being superseded, and as a supersedeas might be authorized by the order of a single judge

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1799. Brown v. Jacobs, Gent.

judge, as well as by the court; that being therefore distinct authorities, an averment that the act was done by one, could not support an averment that it was done by the other.

But it was ruled, That the defendant was discharged by virtue of the writ of supersedeas, and the averment therefore immaterial.

[728] The writ was to take *Margaret Brown*, otherwise *Suthall*, spinster. In the declaration, the word spinster was wanting; and for that, objected to as bad.

It was ruled by Kenyon, That if the word had been in the record, and not in the writ, that it would have been a fatal variance; but that being in the writ, but not in the declaration, that it was not fatal.

The defendant afterwards had a verdict.

Gibbs and *Abbott* for the Plaintiff.

Garrow and *Lawes* for the Defendant.

Same Day.

Bowen *v.* Pitman, Gent.

ASSUMPSIT to recover from the defendant a sum of money, being an allowance of 2 per cent, for measuring houses belonging to the defendant.

The defendant having been very extensively engaged in buildings, had entered into an agreement with the plaintiff, by which the latter contracted to measure all the houses he built, at an allowance of 2 per cent. The agreement was in writing, but had not been stamped.

Before the bringing of the action, the plaintiff's attorney engrossed a copy of the agreement on a sheet of paper properly stamped, and sent it to the defendant, requesting that he would execute it; which the defendant refused to do.

The plaintiff's attorney had the agreement stamped; and it was so given in evidence, and had a verdict.

Lord Kenyon said, That under those circumstances of misconduct in the defendant, he thought the costs of stamping the agreement ought to be included in the costs of the action; [729] and directed that the master should be so instructed in taxing the costs.

Garrow and *Marryat* for the Plaintiff.

Erskine for the Defendant.

Martin

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SITTING-DAY AFTER TERM AT GUILDHALL.

MARTIN q. t. *v.* GREENLEAF.

MARTIN q. t. *v.* GREENLEAF.

Thursday, Feb. 27.

To enable a plaintiff to recover the penalty under stat 37 *Geo.* III. 73. the articles of the ship under which the sailor sailed from England (if any) must be given in evidence.

DEBT on Statute 37 *Geo.* III. chap. 73.

The declaration stated, "That the defendant, being "the master of a certain ship, called the *Hope*, belonging to "the port of *London*, did, in parts beyond the seas, to wit, at *Jamaica*, &c. hire one *Francis Barton*, to serve as a seaman on "board the said ship, called the *Hope*; the defendant knowing "him to be a deserter from a certain other ship, called the *Royal* "*Edward*, belonging to the port of *London*; and which had "come from thence to *Jamaica*."

Barton was called. He proved that he had sailed from *England* on board the *West India* ship, the *Royal Edward*, to *Jamaica*: That he had deserted from the said ship at *Port Antonio*, where he was engaged by the defendant: That he then informed the defendant that he had so deserted; who replied, he did not mind that, as the captain of the *Royal Edward* would not follow him: That he was then engaged by the defendant, and served in the voyage home to *England*. [730]

It appeared in the course of his evidence, that he had signed articles on board the *Royal Edward*, under which he had sailed.

The defendant's counsel insisted that these articles ought to be produced in evidence.

It was answered by the plaintiff's counsel, that they had not those articles, nor any mode of procuring them, insomuch as they belonged to the captain of the *Royal Edward*; but that they were unnecessary here, it being established in evidence that *Barton* was a sailor serving on board the *Royal Edward*, who had deserted, and been hired by the defendant, with a full knowledge that he was so; by which the penalty given by the statute had attached; and which circumstances only were necessary to entitle the plaintiff to recover the penalty.

Lord KENYON said, That he was of opinion the articles were necessary to be produced, as it should appear by the articles under what terms the defendant sailed on board the *Royal Edward*; whether in fact he sailed in the capacity of a seaman or not. It might happen that he was not a regular seaman on board of her; or that by something in the articles he might

1799. have been justified in leaving the ship: in either of which cases the plaintiff could not recover.

MARTIN q. t. v. GREENLEAF.

The plaintiff was nonsuited.

Garrow and *Robinson* for the Plaintiff.

Erskine and *Lawes* for the Defendant.

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WELLS *v.* MASTERMAN, *et alt.*

A bill, though drawn on a partnership, and accepted by one of the partners, if for a separate debt of one of them, shall not bind the partnership, if the party knew the consideration of the bill. *Aliter*, if in the hands of a *bona fide* indorsee without notice.

ASSUMPSIT on two bills of exchange, drawn by the plaintiff on the defendants, by the style of *James Masterman and Co.* dated the 30th of *January*, 1798; accepted by *James Masterman* only, without the words *and Co.*

The partnership had commenced in 1795.

James Masterman carried on a separate trade on his own account, and had had dealings with the plaintiff before his partnership, who had also dealings with the partnership.

Garrow, for the defendants, stated his defence to be, That the bills were drawn on the separate concern of *James Masterman* only; and that the acceptance in question did not bind the partnership, so that an action could be maintained against them, as the acceptors of the bills in question; and he produced another bill of exchange, in the same style and manner as those in question, but accepted by *Masterman and Co.* which had been paid.

Lord KENYON. When a man enters into a partnership, he certainly commits his dearest rights to the discretion of every one who form a part of that partnership in which he engages; [732] and if a bill is drawn upon the partnership in their usual style and firm, and it is accepted by one of the partners, it certainly binds the partnership to the payment of it; but if a man has dealings with one partner only, and he draws a bill on the partnership on account of those dealings, he is guilty of a fraud, and in his hands the acceptance made by that partner would be void; but it would be otherwise in the case of a *bona fide* indorsee. In his hands, the acceptance of one of the partners binds the partnership, as he is ignorant of the circumstances under which it was created, and takes it on the credit of the partnership name.

Erskine, Gibbs, and *Giles* for the Plaintiff.

Garrow and *Vaughan*, Serjeant, for the Defendant.

MICHOL

Nichol *et alt.* v. Martyn. 1799.

A servant, while in his master's service, may solicit business from his customers for himself, when his service is at an end, and he sets up on his own account.

THIS was a special action on the case, against the defendant, for seducing the plaintiffs' customers.

The plaintiffs were wholesale ironmongers, who carried on a very extensive business; the defendant had been employed by them as their rider or traveller, to get orders in the course of their business; and the foundation of the action was, That the defendant, who at the time of bringing the action was in the same line of business with the plaintiffs, had, during the time that he was in their employment, endeavoured to seduce the several country shopkeepers who were in the habits of dealing with the plaintiffs, to leave off dealing with them, and to transfer their business to the defendant.

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To prove the plaintiffs' case, they called some of those country shopkeepers. Their evidence proved that the defendant on his last coming to their shops as rider to the plaintiffs, and on their business, had told them that he was himself going into the same business with the plaintiffs after *Christmas*, and would then be obliged to them for an order on his own account.

It appeared, however, on the cross examination of those witnesses, that he took the orders regularly for the plaintiffs on that journey, and that they were executed on the plaintiffs' account; and that no solicitation was used by the defendant for any order at that time, which might have been supplied by the plaintiffs.

It was also admitted, that in fact, the time of the defendant's engagement to serve the plaintiffs, expired at the beginning of the year; so that, in truth, in the month of *March* he would have been completely his own master.

Lord Kenyon, Chief Justice. The conduct of the defendant in this case, may perhaps be accounted not handsome; but I cannot say that it is contrary to law. The relation in which he stood to the plaintiffs, as their servant, imposed on him a duty which is called of imperfect obligation, but not such as can enable the plaintiffs to maintain an action. A servant, while engaged in the service of his master, has no right to do any act which may injure his trade, or undermine his business; but every one has a right, if he can, to better his situation in the world; and if he does it by means not contrary to law, though the master may be eventually injured, it is *damnum* [734]

abs.

1799.

NICHOL et alt. v. MARTIN.

abs. injuria. There is nothing morally bad, or very improper in a servant, who has it in contemplation at a future period to set up for himself, to endeavour to conciliate the regard of his master's customers, and to recommend himself to them, so as to procure some business from them as well as others. In the present case, the defendant did not solicit the present orders of the customers; on the contrary, he took for the plaintiffs all those he could obtain: his request of business for himself was prospective, and for a time when the relation of master and servant between him and the plaintiffs would be at an end.

It was suggested in the course of the cause, that the defendant had seduced some of the servants of the plaintiffs to quit their service, and to enter into his when he went into business.

Upon that point Lord KENYON said, That seducing a servant, and enticing him to leave his master, while the master by the contract had a right to his services, was certainly actionable; but that to induce a servant to leave his master's service at the expiration of the time for which the servant had hired himself, although the servant had no intention at the time of quitting his master's service, was not the subject of an action.

The plaintiffs were nonsuited.

Erskine, *Garrow*, *Gibbs*, and *Best*, for the Plaintiffs.

Law, *Adams*, and *Maryat*, for the Defendant.

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IN THE COMMON PLEAS.

SITTINGS AFTER TERM AT GUILDHALL.

Monday, Feb. 22.

POWEL v. GORDON.

A witness who has a power of attorney from the plaintiff to sue for money due to him, and who expects to pay his own debt out of money to be recovered in

ASSUMPSIT by the plaintiff, who was a seaman, to recover from the defendant, as Captain of the ship *Enterprize*, the amount of the plaintiff's wages on a voyage to the *West Indies*.

To prove the amount of the demand, a witness was called who had accompanied the plaintiff on board the defendant's vessel, after her return to *England*, to demand the wages; and to whom the defendant offered to pay a smaller sum than that claimed, which had been refused, and the action brought.

This

1799.

POWEL v. GORDON.

This witness was asked, on his *voire dire*, If he had not a power of attorney from the plaintiff, who was then abroad, to sue for and recover this money? He answered in the affirmative. He further admitted, in the course of his examination, That the plaintiff was in his debt, and that he meant to pay himself out of the money claimed by this action, if it should be recovered. He was then asked, If he would consent that some other person should receive the money? which he refused.

the action in which he is a witness, is incompetent.

He was objected to as an incompetent witness. [736]

The plaintiff's counsel contended, That the objection went to the witness's credit only, and not to his competence: that if the mere expectation of being paid was to render a witness who was a creditor incompetent, no creditor could be a witness for his debtor in any action brought by the debtor for money due to him; for by enabling his debtor to recover, he certainly increased his ability to pay his debts.

Eyre, Chief Justice, said, He was of opinion he had a direct interest; for by his testimony, he was enabling himself to pay his own debt. He was therefore incompetent, and was rejected.

The plaintiff having no other evidence, was nonsuited.

Cockell, Serjeant, and *'Espinasse* for the Plaintiff.

Shepherd, Serjeant, for the Defendant.

Roberts, Ass. of Robertson, v. Morgan.

Tuesday, Feb. 21.

A creditor under a former commission of bankrupt, to whom the bankrupt made a promise to pay, is an incompetent witness to prove the petitioning creditor's debt under a second commission.

THIS was an action of trover for a bill of exchange brought by the plaintiff, as the assignee of Robertson, a bankrupt.

The plaintiff called a witness to prove the petitioning creditor's debt.

He was asked on his *voir dire*, Whether he was not a creditor? He answered, that he had been a creditor under a former commission which had issued against *Robinson* the bankrupt, but was not so under the present. * He was then asked, Whether the bankrupt had entered into any new security or engagement to pay him the money due under the former commission? He answered, That after the issuing of the former commission, and before the bankrupt had obtained his certificate under it, he had seen him; when *Robertson* lamented [*737]

very

1799.

ROBERTS, Ass. of ROBERTSON v. MORGAN.

very much the loss the witness had suffered by his failure, and at the same time added, in the most solemn manner, That he should not suffer; but that he had no security or engagement farther than he had stated.

He was then objected to as incompetent, on the ground that he, by the new promise, became a creditor under the second commission; the petitioning creditor's debt, under which he was about to establish by his testimony.

It was answered,* that the promise made by the bankrupt amounted to nothing; for that being made before the bankrupt had obtained his certificate under the first commission, it was of no effect.

EYRE, Chief Justice, said, he was clearly of opinion, that the witness was incompetent:—he said there was no doubt that a bankrupt might bind himself by a new promise to pay a debt, which would otherwise be barred by a certificate under a former commission: That by the new promise it became a new debt, and it could be recovered in an action. That was the case here; the bankrupt had, by the new promise, revived the former debt, or rather created a new one, proveable under

[738] the present commission; if so, he was a creditor under the present commission, and of course an incompetent witness to prove any thing necessary to support it. His Lordship added, As to the time when the promise was made, that makes no difference; for the certificate will not avoid any act, or bar any claim arising between the issuing of the commission and the certificate.

Cockell, Serjeant, and *Bayley* for the Plaintiff.

Leblanc, Serjeant, and *Shepherd*, Serjeant, for the Defendant.

Vide *Truman* v. *Fenton*, Comp. 544. *Besford* v. *Saunders*, 2 H. Black.

IN

IN THE KING'S BENCH;

IN EASTER TERM 25 GEO. III.

In the case of Scarman *v.* Castill, *ante fol.* 270, *it was said to have been decided by the Court of King's Bench, that a master was not liable for medicines, &c. furnished to his servant. Having been favoured with a note of that case, which is not in print, I have here subjoined it as a decision by the Court on that point.*

NEWBY *v.* WILTSHIRE.

ASSUMPSIT for money paid, laid out, and expended for the defendant's use, which came on to be tried at the assizes for the county of *Cambridge;* when the following case was reserved.

The case stated, That the defendant, a farmer, sent his waggon in *May*, 1784, to *Cambridge;* and in returning, a boy that had been sent with it, fell from the shafts and broke his leg; that the boy could not be removed out of the parish where the accident happened, on account of the danger it might occasion; that the plaintiff was overseer of the parish where the accident happened, and took the charge of getting the boy cured upon himself; that it was necessary to cut off the leg; and the overseer expended in and about the cure 32*l.*; that afterwards the boy served the remainder of the year with his master, and the action was brought to recover from the defendant the expenses of the boy's cure.

Sayer, for the plaintiff, contended that the action was well brought, and insisted first, that the master was generally liable for the cure of all accidents that might happen to his servant while in his service. 2dly, That he was liable upon the particular circumstances of the case. The parish had nothing to do with accidents of this sort; and a master could not dis- [740]
charge

1784. charge a servant in his sickness, but was bound to maintain him as long as it lasted. *Rex* v. *Christchurch. Bur. Set. Cas.* 158. The master might have a particular action for the beating of his servant, upon the principle of the loss of service; and in 2d *Bulst.* 332, an action was brought by a master against a surgeon for prolonging the cure of his servant. The fair inference is, that the master is liable generally to bear the expenses. He cited *Stra.* 99.—2dly, The master was bound to answer the same under the particular circumstances of this case, and cited *Watson* v. *Turner, Bull. N. P.* 281.

NEWBY v. WILTSHIRE.

Wilson for the defendant.—This action is not maintainable by one parish-officer only. There was no order made to remove the pauper: the action ought to have been brought by the boy himself, or by the surgeon who cured him. If the parish is liable, the master is not; and there is nothing in the case that will amount to an express undertaking on the part
[741] of the master: his ability to maintain the servant is out of the question, as it would be impossible in a case of this kind to ascertain that; and the question is, Whether a master, who has contracted to pay 1*l*. 10*s*. a year, wages and board, is also liable by the force of that contract, to pay 32*l*. for the cure of his leg? The court will not say that he is under an implied contract to do it, unless there was strong authority to warrant the position. The only case which proves this idea is, *Rex* v. *Christchurch;* but there the Judge's *dictum* was extrajudicial, and could not imply an engagement to the extent of the present. The general understanding upon the subject has always been, that the master is not obliged to pay for medicines furnished during the sickness of his servant: and there being no cases on the subject, is a proof that such action is not maintainable. The legislature has wisely thrown charges of this kind upon the parish at large, as they have in cases of actions against the hundred; not upon a principle of negligence, but that the burden may be divided. If the court decides that the master is liable, it will greatly discourage yearly hirings. Perhaps it may be said, that the master is liable for the board of the pauper, if not for the expenses of the cure; but no distinction can be made between what was food and what was only medicines; and the same person must be liable for both. *Watson* v. *Turner,* proves that the parish is liable, without an ex-
[742] press original undertaking.

Sayer, in reply, said, the parish was called upon in this case,

ex

ex necessitate rei; and therefore, not precluded from their remedy against the master, they would have been liable to an indictment for neglecting the boy in that situation. No objection, that only one overseer brings the action, for this was the only acting overseer, and he only paid the money for the cure.

Lord MANSFIELD, Chief Justice.—I don't applaud the humanity of the master in this case; he does not inquire after his servant for six weeks after the accident; and when he does, "he passes by on the other side." I think, in general, a master ought to maintain his servants, and take care of them in sickness; but the question now is, What is the law? There is, in point of law, no action against the master to compel him to repay the parish for the cure of his servant: no authority whatsoever has been cited; and it seems to me that it cannot be. The parish is bound to take care of accidents; they do their duty in that respect; therefore I am inclined to think that the plaintiff cannot recover.

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Willes and *Ashurst,* Justices.—Same opinion.

Buller, Just.—The objection with regard to only one overseer bringing the action, I think, cannot be got over; for the sole act in the business by one, *viz.* paying the money, is not sufficient; all should have joined.

Judgment for the Defendant.

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BENJAMIN BENSLEY,
Nelson-square.